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Initial reports of States parties due in 2000

South Africa*

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Abbreviations and acronyms

CC	Constitutional Court
COSATU	Congress of South African Trade Unions
FCS	Family Violence, Child Protection and Sexual Offences
FEDUSA	Federation of Democratic Unions of South Africa
GCIS	Government Communication and Information System
ICASA	Independent Communications Authority of South Africa
ICCJ	Intersectoral Committee on Child Justice
IEC	Independent Electoral Commission
IMC	Inter-Ministerial Committee
IPCD	Independent Police Complaints Directorate
JCPS	Justice Crime Prevention and Security
LAB	Legal Aid Board
LGBTIs	Lesbian, Gays, Bisexuals, Transgender and Intersex Persons
MDDA	Media Development and Diversity Agency
NCCEMD	National Committee into Confidential Inquiries into Maternal Deaths
NCC	National Consultative Council
NCPS	National Crime Prevention Strategy
NKC	National Khoi-San Council
NLBs	National Language Bodies
NPA	National Prosecuting Authority
OSW	Office on the Status of Women
SA	South Africa
SCA	Supreme Court of Appeal
SAHRC	South African Human Rights Commission
SANDF	South African National Defence Force
WCAR	World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance

I. Introduction

1. South Africa ratified the International Covenant on Civil and Political Rights on 10 December 1998. In accordance its article 49, paragraph 2, the Covenant entered into force on 10 March 1999. Upon ratification, South Africa made a declaration under article 41 of the Covenant whereby it accepted the competence of the Human Rights Committee (the Committee) to receive communications by state parties alleging violations of the rights protected in the Covenant. South Africa has also since ratified the Optional Protocol to the International Covenant on Civil and Political Rights, as well as the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty,which both entered into force on 28 November 2002. In terms of the obligations under article 40 of the Covenant, South Africa's Initial Report was due before the Committee on 9 March 2000 and thereafter whenever the Committee so required. Because South Africa had to prepare a number of reports under the United Nations and African Union Human Rights systems there was a delay in preparing its initial report. South Africa was to submit a Core Document outlining in detail the history of the country and its peoples as well as the structure of government as stipulated by the Constitution. **An updated version of the Core Document has been submitted under other reports in 2013.**

2. In this report, the South African Government (the Government) details the measures that it has undertaken to give effect to the rights recognized under the Covenant. This report is divided into three parts. The first provides an introduction; the second provides details of the legislative, judicial or administrative measures in place in South Africa to promote enjoyment of the rights guaranteed in the Covenant; the third provides concluding remarks.

Brief historical overview and the socioeconomic challenges facing South Africa

3. On 21 March 1960, in what became known as the Sharpeville Massacre, security forces shot unarmed demonstrators who had gathered in Sharpeville to protest against the pass laws, killing 69 people of African descent and injuring at least 180. This signalled the start of armed resistance in South Africa and prompted worldwide condemnation of South Africa's apartheid policies. By 1976, young people in schools and colleges had joined in the resistance. The 1976 Soweto Uprising was initiated by schoolchildren protesting against the introduction of Afrikaans as the medium of instruction.

4. The struggle against apartheid intensified in the late 1980s. The establishment of the United Democratic Front in 1983 marked the creative utilization of political and legal forces to complement the armed struggle. Sanctions and other forms of pressure supplemented the efforts of the South African people. This sustained opposition to apartheid culminated in the beginning of the process towards democratization marked by the release of Walter Sisulu and other political leaders who had been imprisoned for nearly three decades. On 2 February 1990 all political parties were unbanned. When Nelson Mandela walked out of prison in 1990, the stage was set for formal negotiations with the leadership of the liberation movement. Negotiations for the abolition of apartheid were conducted under the guidance of the Convention for a Democratic South Africa.

5. On 27 April 1994 an Interim Constitution was adopted as the first step towards democracy in South Africa. The Interim Constitution brought about several fundamental changes in the country's political and legal structure. For example, the Interim Constitution meant that for the first time in the history of South Africa, the vote and associated political

and civil rights were accorded to all citizens irrespective of race. The doctrine of parliamentary supremacy was also replaced by the doctrine of constitutional supremacy.

6. The first democratic elections in South Africa were held in April 1994. Later that year Nelson Mandela was inaugurated as the first democratically elected President. In 1996, after two years of further debate and negotiations, the final South African Constitution was adopted. The new democratic government introduced transformational human rights laws aimed at giving effect to the values embodied in the Constitution. The Government has put in place legal frameworks that allow people of different races and cultures to have equal opportunities and freedoms.

7. Although many of the apartheid laws were removed from the statute books, the social consequences of such laws and policies continue to define the South African economic, social and cultural landscape. Racially defined economic and social inequalities remain part of South African life and most of the land in the country remains in the hands of the white beneficiaries of the **Black Land Act, 1913 (Act No. 27 of 1913)**. All other economic and social indicators, including control of the economy, income distribution, and access to jobs and other life opportunities, are still racially defined or at least influenced by dynamics connected to race. In post-apartheid South Africa, unemployment has been extremely high, as the country has struggled with many challenges. While many blacks have risen to the middle or upper classes, the overall unemployment rate among blacks is still worse than among whites although poverty among whites, previously rare, has increased substantially.

8. Apartheid left South Africa with high levels of inequality, unemployment and poverty. Consequently, South Africa's Gini coefficient is among the highest in the world. Despite the economic growth recorded in South Africa since 1994, millions of predominantly black people languish in poverty and underdevelopment. The human rights espoused in the Constitution remain elusive for the many South Africans trapped in poverty. In response, the Government has put together programmes, including the National Development Plan, to redress the imbalances inherited from the apartheid system.

II. Information relating to articles 1–27 of the Covenant

Article 1 – Self-determination

A. Right to freely determine political status

9. The right of South African people to freely determine their political status at the national, provincial and local levels of governance is protected by the Constitution. The framework for the realization of this right in practice obtains under several pieces of legislation, chief among which is the **Electoral Act, 1998 (Act No. 73 of 1998)**.

10. To ensure improved voter access, South Africa increased the number of voting stations from 14,650 in 1999 to 19,726 in the 2009 general elections. This and an increase in voting districts meant that voters spent less time waiting in queues to vote. The average number of registered voters per voting station in the 1999 elections was 1,240. This figure decreased to 1,219 in the 2004 elections and then to 1,175 in the 2009 elections. Research commissioned by the Independent Electoral Commission (IEC) and conducted by the Human Sciences Research Council in 2009 found that 86 per cent of voters could reach their voting stations within 30 minutes or less in the 2009 election, while 80 per cent of voters queued for 60 minutes or less to vote at their station. However, 90 per cent of rural voters queued for up to 60 minutes compared to only 67 per cent of urban voters. Notably,

until the 2009 elections, South African citizens residing outside the country were not given the means of casting their votes while absent from the country. However, following the decision of the Constitutional Court in **Richter v Minister of Home Affairs and Others CCT 09/09 (2009) ZACC 3**, South African citizens who are registered voters but absent from the country on a polling day are now entitled to vote. In this case, the Constitutional Court declared section 33(1)(e) of the Electoral Act unconstitutional to the extent that it prevented South African citizens who are absent from South Africa from voting in the national elections. The Court stated that the right to vote is infringed if a registered voter is willing to take reasonable steps to exercise his/her right to vote, but is nevertheless prevented from doing so by a statutory provision. Therefore, in the 2009 elections, the IEC approved 18,855 notifications from registered voters who intended to vote outside South Africa. On voting day, 9,857 votes were actually cast outside South Africa at 123 foreign missions.

11. Section 19 of the Constitution ensures that citizens are provided with the opportunity to align themselves freely with the political cause or party of their choice without fear of adverse consequences. The section is vertically enforceable against the state and also horizontally enforceable against private actors. In this regard, citizens are free to make political choices, which include the right to form a political party; participate in the activities of, or recruit members for, a political party; and campaign for a political party or cause. In addition, citizens of 18 years and older are guaranteed the right to vote and stand for public office in free, fair and regular elections for any legislative body established in terms of the Constitution, which thus appreciates that "the right to vote is indispensable to, and empty without, the right to free and fair elections" – **New National Party of South Africa v Government of the Republic of South Africa 1999 (3) SA 191 (CC)**.

12. The right of communities to elect representatives for their respective municipalities is guaranteed by the Local Government: **Municipal Electoral Act, 2000(Act No. 27 of 2000)**. These elections, based on the mixed system of both wards and proportional representation, take place every five years, the most recent in May 2014. South Africa has three types of municipal councils: metropolitan councils (category A), local councils (category B) and district councils (category C; these have executive and legislative powers in areas that include local municipalities). Metropolitan municipalities have two types of elections in each ward: the council ward and proportional representation elections. All local municipalities, with the exception of metropolitan municipalities, have three types of elections in each ward: local council ward, local council proportional representation and district council proportional representation.

13. Admittedly, problems of illiteracy among formerly disadvantaged populations necessarily entail that the level of participation in the political processes by some citizens is attenuated. The Government, however, with the help of civil society organizations, is undertaking steps to eradicate the problem. Ahead of the 2009 elections, the IEC and civil society engaged in massive civic education. In total, the IEC conducted 254,857 educational interventions, which were multifaceted and included community presentations, workshops, site visits and walkabouts as well as widespread campaigns, seminars, events and advocacy initiatives. With the financial assistance of the donor community, a voter education booklet was printed in the 11 official languages and distributed throughout the country.

14. Peculiar challenges were faced when dealing with indigenous groups, particularly the !Xun, !Khwe, Khomani San and the Nama. The challenge the IEC faced during voter education campaigns was the engagement of these communities and the creation of educational material in their own languages. For the Nama, the problem was mitigated by the translation of the voter education booklet into their language, Nama. The translation was made possible with the help of the Pan South African Language Board. The process of

developing a dictionary for the !Xun and !Khwe is under way. Programmes for the teaching of the Nama language among the Khomani San and Namahave already been initiated. In the long run, South Africa has committed itself to increasing its expenditure on voter education and other social goods with a view to uplifting disadvantaged communities.

15. Since the dawn of democracy, from the first national general elections on 27 April 1994, South Africa has had free and fair national and local government elections, although there were incidents of political intolerance before and during those elections, including some violence.

16. The IEC continues with its voter education programmes, especially to call on the public and political parties to refrain from political intolerance and violence. Political parties also make this call to their members.

B. Right to freely pursue economic, social and cultural development

17. Section 235 of the Constitution guarantees the right of the South African people as a whole to self-determination and extends this right to any community sharing a common cultural and language heritage within a territorial entity in the Republic. Under section 31, the Constitution promotes the social and cultural development of cultural, religious and linguistic communities in the country. The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities now ensures, in practice, the enjoyment of the rights of these communities. (The powers and functions of this Commission are explained at greater length in the discussion under article 27.)

18. Although the Government is still in the process of acceding to the International Covenant on Economic, Social and Cultural Rights, some positive measures have been taken to protect the right of different groups of people to freely pursue their economic, social and cultural development. For instance, in 1999, the National Khoi-San Council (NKC) was established to foster the interests and recognition of the Khoi-San people. It remains the official channel for discussion of Khoi-San aspirations and concerns. The Council comprises 21 representatives of the five main groupings of the Khoi-San communities: Griqua, Korana, Cape Khoi, Nama and San,and its main focus has been to engage the Government on the issue of recognition of indigenous peoples' traditional structures and authority. The NKC, on behalf of indigenous communities in South Africa, has sought the enactment of specific legislation providing for the recognition of Khoi-San communities and leadership. Alternatively, they demand that the **National House of Traditional Leaders Act, 2009** and the **Traditional Leadership and Governance Framework Act, 2003 (Act No. 43 of 2003)** be amended and expanded "to accommodate participation by the Khoi-San at the local, provincial and national levels of government". Discussion of these issues continues. According to Chief Little, chair of the NKC, "there is a flicker of hope" that the state will eventually grant indigenous communities their wishes through continued constructive engagement. The NKC has reaped some success already. It gave the Department of Traditional Affairs expert advice on the criteria to be used with respect to the recognition of Khoi-San communities and their leaders. It has also assisted the Department with research on the history of Khoi-San communities and was actively involved during the drafting of the **National Traditional Affairs Bill of 2013** in as much it relates to the Khoi-San.

19. In 2003, the **Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003)**, was enacted to provide for the recognition of traditional communities and their leadership structures. Under the Act, a community may establish a council for their promotion and protection. Such a council must apply to the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities for recognition. Such a council may, upon recognition, participate in the National Consultative

Council and apply for financial assistance from the Commission or any other state organ. Various Rastafarian community councils were recognized between 2010 and 2011.

C. Right to freely dispose of natural resources and not to be deprived of the means of subsistence

20. Section 25(1) of the Constitution guarantees existing property rights and states that "no one may be arbitrarily deprived of property except in terms of a law of general application". In relation to land, on which a majority of South Africans depend for their subsistence, the Government has had to adopt redistribution, tenure reform and restitution policies that are in line with international law and practice. Their aim is to reverse the legacy of apartheid, which saw millions of South Africans dispossessed of their land.

21. Section 25(6) of the Constitution states that a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled either to tenure which is legally secure or to comparable redress. A number of statutes provide the framework for the implementation of this constitutional requirement, including **the Land Reform [Labour Tenants) Act, 1996 (Act No. 3 of 1996), the Extension of Security of Tenure Act, 1997 (Act No. 62 of 1997),** and the **Upgrading of Land Tenure Rights Act, 1991 (Act No. 112 of 1991).** The **Land Reform Act** seeks to guarantee security of tenure of labour tenants and those occupying or using land because of their association with labour tenants. The Extension of **Security of Tenure Act** provides for the extension of security of tenure for occupiers of land while giving due recognition to the rights and duties and legitimate interests of owners. The Upgrading of **Land Tenure Act** provides for the conversion into ownership of the more tenuous land rights granted to black South Africans during the apartheid era.

22. In similar vein, section 25(7) of the Constitution provides that a person or community dispossessed of property after 19 June 1913 because of past racially discriminatory laws or practices is entitled either to restitution of that property or to equitable redress. The **Restitution of Land Rights Act, 1994 (Act No. 22 of 1994),** provides the legal and institutional framework for the restitution envisaged by the Constitution. The Act establishes the Commission on Restitution of Land Claims and the Land Claims Court, which deal with matters relating to land restitution. In accordance with the above constitutional provisions and statutes, the Department of Land Affairs has already restored land rights to the Khoi-San people through the land reform programme (Khomani San land claim). By January 2008, a total of 2712615.04 hectares of land had been redistributed through the implementation of the various land redistribution programmes.

23. The Constitutional Court's decision in **Department of Land Affairs and Ten Others v Goedgelegen Tropical Fruits (Pty) Ltd2007 ZA CC 12** is likely to significantly affect the manner in which future claims for restitution under the **Restitution of Land Rights Act** will be dealt with. The applicants lodged a claim for the restitution of their land rights under the Act on the basis of having been dispossessed of land because of racially discriminatory laws and practices after 19 June 1913.When the claim was accepted by the Regional Land Commissioner, the current owner of the land lodged his opposition to the claim. The Constitutional Court had to consider whether the termination of a labour tenancy by private farmers entitled the affected labour tenants to redress under the **Restitution of Land Rights Act**. The Court held that past racially discriminatory laws favoured farm owners who dispossessed people in the applicants' position of their rights. The Court further held that the causal connection under section 2 of the **Restitution of Land Rights Act** should not be understood to require that the state or public functionary should itself perform the dispossession of the rights. It is sufficient that the termination of rights is permitted, aided and supported by past racially discriminatory laws or practices. On the

facts of this case, the Court concluded that the applicants had indeed been dispossessed of their land because of past racially discriminatory laws and practices and that their claims were therefore valid.

24. Despite the progress made so far, evictions of farm dwellers and labour tenants are still prevalent. The Department of Land Affairs has embarked on initiatives to assist farm dwellers and labour tenants who have been or are faced with evictions. The Department established a panel of attorneys to legally represent such persons in eviction matters, and has subsequently also established a "land rights management facility" which expands on the concept of having a panel of service providers (legal practitioners) to assist farm dwellers and labour tenants in eviction matters. Further, in response to the problem of evictions, the **Extension of Security of Tenure Bill, 2013** was drafted to confer independent tenure security on farm dwellers and labour tenants. It aims further to provide for: the continued protection of rights; a support framework for persons who live and work on farms; state assistance in the settlement of interested and affected persons on alternative land; measures aimed at security of tenure, sustainable livelihoods and production discipline; and acquisition of rights in land for resettlement.

25. The other major unresolved tenure security issue concerns the continued vesting of communal land in the state. Related to this problem is the lack of adequate legal recognition of customary or communal systems and the attendant land tenure rights held by communities, families, households or persons on this land. This lack of clarity on land rights and the resultant tensions have hampered development efforts in rural areas. Further, the administration of the land restitution programme faces numerous challenges, including the lack of information and documentation, competing claims, disputes with landowners about the validity of claims, landowners who are unwilling to sell, and high land prices. The Department has launched a Settlement Implementation Support Strategy to provide post -settlement support aimed at ensuring sustainability of land reform projects, including restitution projects. The Commission on Restitution of Land Rights' strategic plan also places special emphasis on the rights and interests of vulnerable groups. During the 2012/2013 financial year, settled restitution claims in all Provinces was 584.

26. The principle of willing buyer, willing seller has proved not to be working. Vast tracts of land are still owned by whites. The principle is to be reviewed.

D. Right to access and dispose of water

27. Under South Africa's former water law,which has n w been effectively abolished, the right to use public water was tied to the ownership of land along watercourses. A new system of water allocation has been phased in to provide equitable access to water, to meet the basic human needs of present and future generations, and to redress the results of past racial and gender discrimination. Everyone's right to access to sufficient water in South Africa is enshrined in section 27(1) (b) of the Constitution. The **Water Services Act, 1997 (Act No. 108 of 1997)**, and the **National Water Act, 1998 (Act No. 36 of 1998)**, protect and facilitate the free exercise of the right to access and dispose of water resources in an equitable, environmentally responsible and sustainable manner. In terms of section 4 of the Water Services Act, everyone is entitled to basic water supply.

28. Despite the new water-resource management policy in South Africa, factors linked to previous discriminatory practices still prevent the free disposal of water to all people. For instance, the lack of necessary infrastructure in rural areas and the lack of effective cost-recovery programmes present serious difficulties. In addition, the culture of non-payment, which developed as a means of protest against human rights abuses during apartheid, and the inability of many people to pay for water services are factors preventing many from fully realizing their right to access to water. The lack of financial and administrative

capacity in the national, provincial and local spheres of government also seriously hinders realization of the rights enshrined in article 1, paragraph 2, of the International Covenant on Civil and Political Rights.

29. Some of the problems with regard to access to water were manifest in the Constitutional Court's decision in **Mazibuko and Others v City of Johannesburg and Others(2009) ZACC 28**. In this case, the applicants sought to challenge the introduction of a quantified provision of kilolitres of water per family per month and also the introduction of prepaid meters in Phiri Township in Soweto. The Court upheld the policy of introducing prepaid meters as well as the setting of an allowance of free water by the City of Johannesburg. What is important, as the Constitutional Court acknowledged, is that most of the problems that the poor in South Africa face in relation to accessing water are intimately related to the skewed policies that apartheid implemented. The Government therefore faces the monumental task of reversing the effects of apartheid in almost all spheres of life.

30. Pertinent to access to water is the right to sanitation which, although not explicitly mentioned in the Constitution, is closely linked to water. The extension of the right to water opens up the possibility of judicial enforcement of the right to basic sanitation in terms of section 27(1)(b) of the Constitution, read with the Water Services Act. In **Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others 2010 (4) BCLR 312 (CC)**, the applicants relied on sections 27 and 26, respectively, of the Constitution and the Water Services Act, and the decision in Mazibuko to enforce their right to basic sanitation.

31. Linked to access to safe water and the right to sanitation is the issue of acid mine drainage – a noteworthy problem in South Africa. This phenomenon is caused by a series of chemical reactions between water and sulphite minerals that results in asulphuric acid solution. It is most prevalent in areas where mining has exposed fresh sulphide minerals to the elements. In South Africa, acid mine drainage is notable in the gold fields and various coal and copper mines. According to the December 2011 report on mine water management in the Witwatersrand gold fields, which was addressed to the inter-ministerial committee on mine management, the main risks identified with acid mine drainage were flooding of mines and decanting acid mine drainage into the environment. The generic approach suggested to manage this issue focuses on three priority areas: decant prevention and management, ingress control to reduce the rate of flooding and central decant volume, and water quality management.

E. Right to use, manage and protect woodlands

32. Under the old Bantu laws and the **Black Administration Act, 1927 (Act No. 38 of 1927)**, the use and management of natural woodland resources that were considered communal were assigned to tribal authorities, although some national regulations took precedence over them. Despite traditional control over harvesting of natural products, woodlands have been overexploited in many areas. The loss of protected forests causes concern, as does the lack of adequate management systems to support the interests of local communitiesand protect national assets. These factors threaten the fuller realization of the right of present and future generations to freely dispose of forest resources for their own ends and may indirectly affect, to an extent, the enjoyment of other civil and political rights set forth in the Covenant. Everyone's right to have the environment protected is enshrined in section 24(b) of the Constitution, for the benefit of present and future generations. Consistent with this right, two pieces of legislation were enacted in 1998: the **National Forests Act, 1998 (Act No. 84 of 1998)**, and the **National Veld and Forest Fire Act, 1998 (Act No. 101 of 1998)**. Together, they provide for the sust nable management, development, use and protection of South Africa's forest resources.

33. It is common cause that the most deprived of all South African people live in rural areas. They have little or no land, fuel or income, and struggle daily with the burden of poverty. The rural nature of forestry creates a natural link between it and the rural population. Forestry can provide a marketable product, employment, building materials, fuel and craft materials. In pursuit of these ends, the new constitutional provisions and legislation (described below) protect and facilitate the free exercise of the right of the people of South Africa to access and dispose of their forest resources in an equitable, environmentally responsible and sustainable manner without prejudice to any obligations arising out of international economic cooperation, based upon international law and the principle of mutual benefit.

Articles 2, paragraph 1; 3; and 26 – Non-discrimination

34. A wide range of provisions in the Constitution provide for non-discrimination and equality and are supported further by an array of legislation providing, in greater detail, the normative and institutional framework for the protection of this right in South Africa. South Africa's jurisprudence on non-discrimination and equality makes a distinction between fair discrimination and unfair discrimination. Only the latter is prohibited. Unfair discrimination is held to have an unfair impact that impairs to a significant extent the fundamental dignity of the complainant. It is discrimination based on one of the grounds listed in section 9 of the Constitution and includes race, gender, sex, ethnic or social origin, sexual orientation, disability, religion, culture and language. If effect, where the discriminatory law or action is designed to achieve a worthy and important societal goal, it may make fair what would otherwise be unfair. This position has been affirmed by the following decisions of the Constitutional Court: **Harksen v Lane NO 1998 (1) SA 300 (CC)**; **S v Ntuli 1996 (1) SA 1207 (CC)** and **President of the Republic of South Africa v Hugo 1997 (4) SA (CC)**.

A. Enjoyment of rights without discrimination

35. South Africa has committed itself to ensuring that all individuals within its territory enjoy the rights to which they are entitled under the Covenant without distinction of any kind. section 9(2) of the Constitution provides for the right to equality, which is expressly stated to include the full and equal enjoyment of all rights and freedoms. In addition, section 9(3) enjoins the state not to unfairly discriminate directly or indirectly against anyone. In substantiation of these constitutional guarantees, legislative, judicial and administrative measures have been taken since 1994 to ensure that everyone in South Africa enjoys his/her rights without discrimination. These measures are discussed in detail under the specific rights to which they relate.

36. With the enactment of the **Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000)**, a major milestone was reached in ensuring the enjoyment of rights without discrimination as contemplated in the Constitution. The Act provides that all Magistrates' Courts and High Courts be designated Equality Courts. At present there are 219 Magistrates' Courts so designated. In 2009/2010, 508 cases were lodged in Equality Courts, compared with 447 cases in 2008/2009. The most notable judgment handed down recently is that in **Afriforum and Another v Malema and Others (2011) ZAEQC** in which the Court confirmed a High Court ruling that the words "shoot the *boer*/farmer" in the struggle song *avudubeleibulu* is hate speech and interdicted the respondent from uttering the words or singing any songs that communicate the same message, as they were deemed capable of instigating violence, distrust and/or hatred between black and white citizens in South Africa.

B. Equality in the workplace

37. In addition to the general prohibition of discrimination under the Promotion of Equality Act, other measures deal with discrimination in specific areas (for example the workplace) and against specific people (for example disabled persons and people living with HIV/AIDS). The achievement of equality in the workplace is, however, still hampered by racial disparity and other obstacles. Black people still by and large occupy unskilled jobs. Arguably, this situation results from a lack of skills on the part of black people, which in turn is a direct consequence of the apartheid era, when black people were restricted to certain fields of employment.

38. The **Employment Equity Act, 1998 (Act No. 55 of 1998)**, provides the main framework for achieving equality in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination. It also creates the framework for implementing affirmative action measures to redress the disadvantages in employment experienced by blacks, women and disabled persons. The Act establishes the Commission for Employment Equity, which advises the Government on equality issues in the workplace.

39. In addition to preventing discrimination against people with disabilities in the workplace, the Government adopted the White Paper on an integrated National Disability Strategy in 1997,which seeks to ensure that government departments consciously make their policies, procedures, practices and programmes disability integrative and inclusive. It also seeks to radically transform attitudes, perceptions and behaviour towards people with disabilities, thus creating a work environment in which disability issues and the needs of people with disabilities are fully integrated.

40. Moreover, the Department of Social Development has developed policy guidelines on rehabilitation services, which focus on supporting people with disabilities to access opportunities that will enable them to become active contributors to their communities and society at large. People with disabilities are now entitled to a disability grant under the **Social Assistance Act, 2004 (Act No. 13 of 2004)**. While there is still a gap between stated policy intentions and the actual implementation, there has been change of attitude and improvement over the years in the condition of people with disabilities. Below is a table indicating the number of disabled people in active employment for 2010.

Number of disabled people in active employment for 2010

Male				*Female*				*Foreign Nationals*	
African	*Coloured*	*Indian*	*White*	*African*	*Coloured*	*Indian*	*White*	*Male*	*Female*
16 365	2 867	1 439	7 139	7 559	2 158	704	4 424	1190	68
37.30%	6.90%	3.30%	16.30%	17.20%	4.90%	1.60%	10.10%	2.70%	0.20%

41. People with disabilities make up approximately 0.83 per cent of the total number of reported employees.

C. HIV/AIDS

42. It is first important to note that HIV status may constitute a ground for unfair discrimination although it is not one of the "listed grounds" for discrimination under section 9 of the Constitution. Thus in **Hoffman v South African Airways 2001 (1) SA 1 (CC)**, the Constitutional Court found that an airline policy of not employing HIV-positive persons as cabin attendants amounted to unfair discrimination. In its efforts to eliminate

discrimination against people living with HIV in society and in the workplace, the Government has enacted several pieces of legislation that prohibit discrimination on the basis of HIV status. The Employment Equity Act, for instance, provides that no person may unfairly discriminate against an employee or an applicant for employment on the basis of their HIV status. The Act also provides that no employee or applicant for employment may be required by their employer to undergo an HIV test in order to ascertain their HIV status. Moreover, the **Labour Relations Act, 1995 (Act No. 66 of1995)**, stipulates that an employee with HIV/AIDS may not be dismissed simply because he/she or she is HIV positive or has AIDS. The Department of Labour has also issued the HIV/AIDS Technical Assistance Guidelines 2003, which advise employers on how to deal with issue of HIV/AIDS in a manner that will improve productivity and lift the morale of infected and affected workers.

D. Sexual orientation

43. Same-sex partnerships are now recognised in law and partners are entitled to all benefits and privileges that previously accrued only to couples in a traditional family. This recognition was pioneered in **National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC)** in which the common law offence of sodomy was invalidated. This case was followed by the recognition of same-sex life partnerships in **Fourie v Minister of Home Affairs 2005 (3) BCLR 241 (SCA)**. As a direct consequence of the Constitutional Court's ruling in this case, the **Civil Union Act, 2006 (Act No. 17 of 2006)**, was enacted, which provides legal recognition of same-sex partnerships.

44. Most recently, the Constitutional Court has held that sections 14(1)(b) and 14(3)(b) of the **Sexual Offences Act, 1957 (Act No. 23 of 1957)**, are unconstitutional in so far as the age of consent to sexual intercourse between people of the same sex was set at 19 years, as opposed to 16 years for the same act between people of the opposite sex. The Court in **Geldenhuys v National Director of Public Prosecutions and Others 2009 (1) SACR 231 (CC)** held that this differentiation amounted to unfair discrimination on the ground of sexual orientation. The **Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007)**, now sets a uniform age of consent of 16 years. A number of cases have affirmed the benefits and privileges to which same-sex partners are entitled. In **DuToit v Minister for Welfare and Population Development 2003 (5) SA 198 (CC)** it was held that partners in same-sex relationships were entitled to jointly adopt and assume guardianship of children just as married persons were.

45. As pertains to intersex persons in South Africa, promulgation of the **Alteration of Sex Description and Sex Status Act, 2003 (Act No. 49 of 2003)**, allows intersex persons to change the sex on their identity documents, and all incidental matters thereto. The word "intersex" has also been inserted and defined in the definition of sex in the **Promotion of Equality and Prevention of Unfair Discrimination Act**, through the **Judicial Matters Amendment Act (Act No. 22 of 2005)**, thereby ensuring protection of and non-discrimination against intersex persons.

46. Despite progress made thus far, much still needs to be done to make the practical enjoyment of human rights, without discrimination, a reality for all South Africans. A major challenge in this regard is the phenomenon of so-called "corrective rape", which is men gang raping black lesbian women, supposedly to "correct" their lesbianism. This is meted out with impunity against black lesbian women in townships. Such cases are prosecuted under the normal structures for rape. An example of this can be found in the rape and murder of a 19-year-old openly lesbian woman in 2006. Nine men were charged with rape and murder. After many postponements, four men were convicted of rape and

murder on 1 February 2012. The National Prosecuting Authority stated that hate crimes would not be tolerated, and should be prioritized by the Government. The Government has established a national taskforce to deal with the problem.

E. Equal rights of women and men

47. The Commission on Gender Equality completed an audit of legislation in 1998, which found that South Africa had made progress in the elimination of formal discrimination in the law but there were other areas where substantive discrimination still persisted. For example, there is evidence that women still receive unequal pay in some sectors because an unequal value is attached to women's work. Similarly, women's participation in mainstream politics remains low. Challenges notwithstanding, the Government is committed to ensuring equal rights for women and men. The Constitution guarantees equality between men and women and prohibits discrimination on the basis of gender, pregnancy and marital status. South Africa's commitment to stamping out discrimination against women is further reflected in its accession to the Convention on the Elimination of all Forms of Discrimination against Women without reservations, which and appeared before the Committee in January 2011. South Africa also ratified the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women without reservations and submitted its initial report under the Convention in 1998. The Government has further committed itself through the SADC Protocol on Gender and Development and the Beijing Platform of Action to undertake activities to promote the human rights of women.

48. In practice, virtually all statutes that discriminated against women before 1994 have been repealed. The **Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998)**, for instance, repealed the provisions of section 11(3) of the Black Administration Act, which condemned African women to a legal status of perpetual minors. It also had the effect of repealing sections 22 and 27(3) of the **KwaZulu Act on the Code of Zulu Law, 1985(Act No. 16 of 1985)**, which entrenched the notion that in that province, a man in a marriage was not only the head of the family but he/she was also the holder of the marital power. See **Elizabeth Gumede (born Shanga) v President of the Republic of South Africa(CCT 50/2008)**.

49. The repeal of discriminatory laws has been followed by the mainstreaming of gender in laws enacted since 1994. The **Recognition of Customary Marriages Act**, for example, enacts formal equality between women and men in customary marriages. The Act provides for the equal status and capacity of spouses who concluded a customary marriage; it enacts a wife's capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.

50. The courts have also played an instrumental role in striking down discriminatory laws and customary practices. For instance, in **Bhe v the Magistrate, Khayelitsha (CCT 49/03) [2004] ZACC 17**; **Shibi v Sitholeand Others (CCT 50/03, CCT 69/03, CCT 49/03) [2004] ZACC 18**; **SA Human Rights Commission v President of the Republic of South Africa2005 (1) BCLR 1 (CC)**, the rule of male primogeniture, which provided that only male heirs could inherit, was invalidated on the grounds that it violated the right to equality of female heirs. In **Brink v Kitshoff1996 (4) SA 197 (CC)**, section 44 of the **Insurance Act, 1943 (Act No. 27 of 1943)**, which deprived married women, in certain circumstances, of some or all the benefits of insurance policies made in favour of them by their husbands, was declared unconstitutional. This Act was replaced by the **Short-term Insurance Act, 1998 (Act No. 53 of 1998)**. In the sphere of pension funds, a uniform contribution has been put in place in contrast to previous practice, which differentiated

between the genders. In the tax system, all overt gender discrimination in tax policies was eliminated beginning in the 1995/96 fiscal year.

51. Like same sex life partnerships, marriages contracted under Islamic and Hindu laws are today recognisable in law, with the effect that couples in such marriages are entitled to benefits and privileges that accrue to couples married under statute. Until the 1999 Supreme Court of Appeal decision in **Amod v Multilateral Motor Vehicle Accidents Fund1999 (4) SA 1319 (SCA)** a marriage contracted according to Islamic law was null and void. This decision recognized a monogamous Islamic marriage for the purposes of support. In **Daniels v Campbell NO and Others2004 (5) SA 331 SA (CC)**, the Constitutional Court held that spouses party to monogamous traditional Islamic marriages are to be considered spouses for the purposes of the Intestate Succession Act and the Maintenance of Surviving Spouses Act. The High Court extended this recognition to include monogamous traditional Hindu marriages in **Govender v Ragavayah NO and Others2008 ZAKHC 86**.

52. The courts have also clamped down racially discriminatory laws. In **Moseneke and Others v the Master and Another 2001(2) SA 18 (CC)**, the Constitutional Court declared unconstitutional section 23(7) of the Black Administration Act which prevented the Master of the Supreme Court from dealing with the estate of a black person who had died intestate, which was rather dealt with by the magistrate of the area in which the deceased ordinarily resided. The Court held that these provisions imposed differentiation on the grounds of race, ethnic origin and colour and as such constituted unfair discrimination.

53. In addition to the above, there has been a steady increase in the number of women ministers and deputy ministers in Cabinet since 1994. A minimum of 25 per cent women representation in Parliament has also been maintained. The Government has been committed to ensuring that women are increasingly recruited to the middle and senior management echelons of the public sector, where affirmative action programmes have also been introduced. For example, the **Electoral Act** requires every registered political party to facilitate the full participation of women in political activities and to take reasonable steps to ensure that women are free to engage in political activities. A summary of the representation of women in political positions in 2013 is presented below:

Representation of women in political positions in 2013

Position	*Female*	*Male*	***Total number***	*% of women representation*
President		1	**1**	0
Deputy President	1		**1**	100
Ministers	12	19	**28**	42
Deputy Ministers	16	16	**32**	40
Premiers	5	4	**9**	44.4
Members of National Parliament	128	264	**392**	33
Members of National Council of Provinces	20	34	**54**	37.3
Members of Executive Committees in Provincial Legislatures	139	277	**416**	33.4

54. In 1994, an Office on the Empowerment of Women was established within the President's office to develop a post-apartheid women's empowerment policy for the Government. Soon thereafter, the Office on the Status of Women (OSW) was established in

the Deputy President's office, followed by provincial OSWs in most provinces. The OSWs, since replaced by the newly established Department on Women, Children and People with Disabilities (DWCPD), coordinated gender units in all government departments, at national and provincial levels. There is also the Ad-hoc Joint Committee on Improvement of Quality of Life and Status of Women, which monitors government commitments to the Convention on the Elimination of All Forms of Discrimination against Women and identifies gaps in existing legislation. Several government departments have also established gender focal points within their departments. The Department of Education, for instance, established a Gender Equity Task Team in 1996 to focus on gender issues in schools and the Department of Land Affairs aims to develop policy guidelines to facilitate women's participation in land reform.

55. The Local Government: **Municipal Structures Act** determines that political parties should "seek to ensure" that 50 per cent of their candidates are women and that these are evenly distributed on the list. During the 2011 local government elections, women comprised only 37 per cent of proportional representative party lists, despite the recommendation of the Act. A major challenge in South Africa is the high incidence of gender violence. As a social phenomenon, it is reflective of a deep-seated, systemic dysfunction of South African society. Recognizing the seriousness of gender violence, the Government has now made it one of the priority crimes under the National Crime Prevention Strategy (NCPS). The Government has also enacted legislation to curb gender violence, principally the **Criminal Law (Sexual Offences and Related Matters) Amendment Act**, known as the **Sexual Offences Act**, and the **Domestic Violence Act, 1998 (Act No. 116 of1998)**. While the Government is aware that these legal mechanisms are reactive in nature and limited in addressing what is otherwise a social phenomenon, it believes that they are still necessary.

56. The Sexual Offences Act repeals the common law offence of rape and replaces it with a new expanded statutory offence, applicable to all forms of sexual penetration without consent, irrespective of gender. It affords a victim of rape the right to require that the alleged perpetrator be tested for his/her HIV status and the right to receive Post Exposure Prophylaxis. In addition, the Act criminalizes exposure or display of child pornography and the trafficking in persons for sexual purposes. It also provides for a national register of sex offenders. It is vital to note here that long before the enactment of the Sexual Offences Act, the judiciary had shown a willingness to discard discriminatory practices that further victimized complainants of sexual offences. In **Jackson v the State (1998) ZASCA 13**, for instance, the Court discarded the rule that corroboration was required in proving sexual offences.

57. The Domestic Violence Act affords victims the maximum protection from domestic abuse. It enshrines a broad definition of domestic violence, which includes economic abuse, emotional, verbal and psychological abuse and any other controlling or abusive behaviour towards a complainant. It also imposes a duty on any member of the South African Police Service to render such assistance to a victim of domestic violence as may be required in the circumstances. In addition to taking measures to protect women from gender violence, the Government has also adopted legislative measures that foster a woman's autonomy over her body and control over her reproductive health. section 12(2) of the Constitution states that everyone has the right to bodily and psychological integrity; this includes the right to make decisions concerning reproduction and the right to security and control over one's body. In this regard, the **Choice on Termination of Pregnancy Act, 1996 (Act No. 92 of 1996)**, permits abortion on request by a woman during the first 12 weeks of her pregnancy, for medical or social reasons in the 13th to 20th week of pregnancy and, after the 20th week, to save the life of the woman or to prevent the foetus from being born malformed or injured. The constitutionality of this Act was tested in **Christian Lawyers Association of SA and Others v Minister of Health and Others 1998(4) SA 1113 (T)**. The High Court

considered an application seeking an order declaring the Act to be unconstitutional. The application contended that section 11 of the Constitution, which provides that everyone has the right to life, applied also to unborn children from the moment of conception. It was held that the foetus was not a legal person under the Constitution and as such, the Act was constitutional.

58. An issue related to women's reproductive health concerns maternal deaths. A system for notification of maternal deaths was put in place in 1997 by the National Committee into Confidential Inquiries into Maternal Deaths (NCCEMD), which was appointed by the Minister of Health. The NCCEMD conducts confidential inquiries into all maternal deaths that are reported. This exercise informs the country of preventable causes of maternal deaths and gaps in the system that must be addressed. As at 2009 the maternal death rate was 410 per 100,000 live births. Although this figure represents a reduction from previous years, it is still a matter of concern.

Article 2, paragraph 3 – The right to an effective remedy

59. In addition to enumerating the rights and fundamental freedoms to which individuals within the Republic are entitled, the Constitution of South Africa also provides for the means of enforcing or vindicating these rights when they are violated. In this regard, section 38 of the Constitution provides that "anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the Court may grant appropriate relief, including a declaration of rights". The persons who may approach the Court in terms of this section are: anyone acting in their own interest; on behalf of another person who cannot act in their own name; acting as a member of, or in the interest of, a group or class of persons; acting in the public interest; and an association acting in the interest of its members.

60. A "competent court", in this context, is one with jurisdiction to apply the Bill of Rights. These are the Constitutional Court, the High Courts, the Supreme Court of Appeal and the Magistrates' Courts. Complementing the courts in guaranteeing the right to an effective remedy are administrative and quasi-judicial mechanisms that offer opportunities for victims of human rights violations to seek redress. These bodies include the South African Human Rights Commission, the Public Protector, the Judicial Inspectorate of Prisons, and the Independent Complaints Directorate.

A. Judicial remedies

61. The Constitutional Court is the highest court in cases regarding the interpretation, protection and enforcement of the Constitution, a core part of which is the Bill of Rights. The jurisprudence of the Constitutional Court shows that it has been willing to give a broad understanding of the remedies it may grant to victims of human rights violations. In **Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC)**, the Court noted that its flexibility in granting remedies would probably have an effect on its understanding of the right(s) claimed to have been violated.

62. Therefore, while the Constitution does not define what may constitute the "appropriate relief" envisaged under section 38, the Constitutional Court has stated that "depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced" – **Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)**. It is in this light that the Constitutional Court may award constitutional damages or compensation to victims of human rights violations.

Since the **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC)** case, the emphasis has been on effective remedies.

63. The Supreme Court of Appeal and the High Court have been equally vigilant in applying the Bill of Rights. The Magistrates' Courts, on their part, were initially only empowered to apply the Bill of Rights in so far as the matter in question related to criminal law and procedure. However, under the Promotion of Equality and Prevention of Unfair Discrimination Act, Magistrates' Courts are designated equality courts. These courts have the power to order the payment of damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering, because of the unfair discrimination, hate speech or harassment in question. Similarly, under the **Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000)**, a Magistrates' Court may be designated to hear review cases under the Act. In addition to granting remedies to specific victims of human rights, the Constitutional Court, the High Court and the Supreme Court of Appeal may strike down legislation that is incompatible with the objects of the Constitution and especially the Bill of Rights. Where the Supreme Court of Appeal or the High Court strikes down a statute, the order must be confirmed by the Constitutional Court to have the force of law. Striking down a statute, however, is not a viable remedy if the legislation is reasonably capable of being reinterpreted in such a way as to remove the incompatibility with the Bill of Rights, in which case the Court will develop the law so that it conforms to the Bill of Rights.

B. Administrative and quasi-judicial remedies

64. The South African Human Rights Commission (SAHRC) is one of the state institutions, envisaged under section 181 of the Constitution, intended to support constitutional democracy in South Africa. The SAHRC is mandated to monitor the observance of human rights in the country. Pursuant to section 184 of the Constitution and the **South Africa Human Rights Commission Act,1994 (Act No. 54 of 1994)**, it is empowered to investigate, report, and take steps to secure appropriate redress where human rights have been violated.

65. In conformity with its mandate, SAHRC runs a Legal Services Programme, which primarily deals with complaints of human rights violations. Since its establishment on 2 October 1995, the Commission has dealt with thousands of complaints on diverse human rights issues and conducted public inquiries in cases where there are systemic or widespread human rights violations. Such inquiries, for example, have been conducted in relation to the right to access to health care services, the condition of farming communities, the right to housing and the right to basic education. These enquiries are conducted with the purpose of making appropriate findings and recommendations to relevant stakeholders.

66. SAHRC also has an Equality Unit that seeks to ensure that the inequalities of the past on the basis of gender, disability and race are eradicated. As such, it monitors and assesses the observance of the right to equality. It also investigates complaints in collaboration with its Legal Department. In terms of the Promotion of Equality and Prevention of Unfair Discrimination Act, the SAHRC may institute legal proceedings in the Equality Court in its own or public interest or on behalf of another person who cannot act in their own name. In this light, the SAHRC has dealt with many complaints touching on the right to equality, most recently the matter of **SAHRC v Qwulane 2011 44/EQ JHB** where a cartoonist and columnist in a newspaper was found guilty of hate speech against homosexuals and ordered to apologize in the paper to the homosexual community. Like the SAHRC, the Office of the Public Protector is one of the state institutions, listed in section 181 of the Constitution, which strengthens constitutional democracy. Its main function, as read with the **Public Protector Act, 1994 (Act No. 23 of 1994)**, is the

investigation of any conduct in state affairs or in public administration in any sphere of government that is alleged or suspected to be improper or to result in any impropriety or prejudice. The Public Protector has the power to take appropriate remedial action upon the investigation and consideration of a complaint lodged against any state agency or official and since its establishment it has received and considered hundreds of complaints touching on diverse issues, including misappropriation of public funds, abuse of power, undue delay in dispensing government services and violation of human rights. The most recent investigation dated 23 April 2010 was into an alleged breach of certain sections of the Executive Members Act and corresponding provisions of the Ethics Code by the premier of the Gauteng Province. The official was found blameless but this is an indication of the commitment to curbing improper behaviour by government officials.

67. Another body that creates a forum for remedying human rights violations is the Judicial Inspectorate of Prisons. This is an independent office established under the **Correctional Services Act, 1998 (Act No. 111 of 1998)**, to facilitate the inspection of prisons. Headed by the Inspecting Judge, the Inspectorate is mandated to inspect and report on the treatment of prisoners in prison and any corrupt or dishonest practices in prison. The Inspectorate is also mandated to receive and deal with complaints from prisoners, thus providing an opportunity for redress of human rights violations in prisons. The Inspectorate has a Legal Services Unit, which receives and processes complaints in addition to holding hearings and enquiries for the purposes of conducting investigations. The Legal Services Unit strives to resolve complaints by mediation but where mediation fails, it makes a ruling either in favour of the complainant or the Department of Correctional Services (DCS). The implementation of and compliance with such rulings are monitored by independent prison visitors who are appointed by the Inspecting Judge.

68. Complaints have been received and investigated at several prisons including Pretoria Central, Johannesburg and Newcastle prisons. A total of 5,709 complaints have been received by independent prison visitors, the majority of which pertain to treatment and conditions in prisons. Discussions have taken place between the Office of the Public Protector, the South Africa Human Rights Commission and the Judicial Inspectorate to establish referral systems and ensure that the mandate of the Inspectorate is realized.

69. Finally, the Independent Complaints Directorate was established in 1997 under the **South African Police Service Act, 1995 (Act No. 68 of 1995)**, to investigate complaints of brutality, criminality and misconduct against members of the South African Police Service (SAPS) and the Municipal Police Service (MPS). It receives and processes complaints from victims, their representatives or from non-governmental organizations and community-based organizations.

Article 4 – State of emergency

70. The question as to when and under what conditions a state of emergency may be declared in contemporary South Africa is duly governed by the Constitution and the **State of Emergency Act, 1997 (Act No. 64 of 1997)**. Pursuant to section 37 of the Constitution, a state of emergency may be declared only in terms of an Act of Parliament, and only when the life of the nation is threatened by war, invasion, general insurrection, disorder, national disaster or other public emergency, and the declaration is necessary to restore peace and order.

71. Recognizing that measures taken during states of emergency are of exceptional and temporary nature and that the protection of human rights during these times becomes all the more important, the Constitution and the State of Emergency Act provide for safety mechanisms to ensure conformity with international requirements and standards. These

include that any legislation enacted in consequence of a state of emergency may derogate from the Bill of Rights only to the extent that the derogation is strictly required by the emergency and that such legislation or action must always conform to the country's international obligations. In this regard, a table of non-derogable rights and the extent to which they are protected are included under section 37 of the Constitution, which also deals with the right to human dignity, life, freedom from slavery and servitude, freedom from torture, and freedom from cruel, inhuman or degrading treatment or punishment.

72. The role of the South African National Defence Force (SANDF) during a state of emergency is purely supportive to that of the South African Police Service (SAPS) (section 201(2)(a) of the Constitution). Conducting operations internally in cooperation with the SAPS is considered a secondary function to that of the defence of the Republic. The **Defence Act, 2002 (Act No. 42 of 2002)**, in section 20(1) essentially stipulates that where a member of the SANDF is utilized for a role in support of the SAPS such member shall have the same powers and duties as those conferred on members of the SAPS. Under section 20(4) of the Act, where a member of the SANDF detains or arrests a person or seizes an article or object, he/she must as soon as possible hand that person, article or object over to a police official. Since the adoption of the Constitution in 1996, no state of emergency has been declared and the practical application of the constitutional and statutory guarantees highlighted above is yet to be tested.

Article 5 – Interpretation, limitations and derogation

73. Section 39 of the Constitution provides that when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. It must also consider international law and it may consider foreign law. section 39(2) further spells out that when interpreting any legislation and when developing the common law or customary law, the purport and objects of the Bill of Rights must be promoted. section 39(3) provides that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation to the extent that they are consistent with the Bill. Thus, in applying the Bill of Rights, the courts, for instance, have adopted a purposive and generous interpretation in favour of rights, and they strive to ensure that their interpretation of the Bill of Rights safeguards the core values that underpin the fundamental rights in an open and democratic society. In **Du Preez v Minister of Justice and Constitutional Development and Others 2006 (9) BCLR 1094 (SE)** it was noted that when applying the Bill of Rights, a court must promote all those values that inform the fundamental rights enshrined in the Bill and must adopt a flexible and comprehensive approach which is acutely sensitive to all constitutional values and objectives. Moreover, courts are enjoined by section 233 of the Constitution to give the Bill of Rights an interpretation that is in conformity with South Africa's international obligations. As discussed above, although the Government continuously endeavours to uphold fundamental rights, it is mindful that in appropriate circumstances, rights may be subject to limitations a set out in section 36 (1) and (2) of the Constitution to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. In the case of **Motala v University of Natal 1995 (3) BCLR 374 (D)** it was emphasized that it is the task of the courts to define the limits of fundamental rights where they appear to encroach upon one another and simultaneously blend them into the common law, modifying the common law whenever necessary to achieve harmony.

74. Derogations from rights in South Africa are only permissible in times of emergency and only to the extent discussed above. The fact that the Covenant does not recognize

certain rights or that it recognizes them to a lesser extent is not a legitimate reason for restriction or derogation from rights in South Africa.

Article 6 – Right to life

75. Section 11 of the Constitution provides that everyone has the right to life. It is a right that is unqualified and imposes upon the state both a positive and a negative duty. Thus in **S v Makwanyane and Another1995 (6) BCLR 665 (CC)**, the Constitutional Court outlawed the death penalty. It held that section 277(1) of the **Criminal Procedure Act,1977 (Act No. 51 of 1977)**, which provided for the death penalty was unconstitutional and therefore invalid. The **Criminal Law Amendment Act, 1997 (Act No. 105 of 1997)**, makes provision for the setting aside and substitution of death sentences in accordance with law. Hearings were held to determine appropriate sentences for persons sentenced to death and all death sentences were at the very least commuted to life imprisonment. In July 2006, the Constitutional Court completed its supervision of the process of substituting death sentences with alternative sentences – **Sibiya and Others v Director of Public Prosecutions and Others 2007 (1) SACR 347 (CC)**.

76. As a country that has abolished the death penalty, South Africa will not remove an accused person from within its borders to a country where that person, if convicted of the alleged offence, may face the death penalty. Such person can only be removed if the South African Government secures an assurance from the receiving state that the accused person, if convicted, will not be sentenced to death. This was evidenced in **Mohamed v President of the Republic of South Africa 2001 (3) SA 893 (CC)**, where the applicant was to be removed to the United States without such written assurance. The Constitutional Court reiterated that where the removal of a person to another country is effected by the state in circumstances that threaten the life or human dignity of such person, sections 10 and 11 of the Constitution, which protect the right to life and dignity, are implicated.

77. There are however certain situations in which the deprivation of life may be lawful. section 7 of the **Judicial Matters Second Amendment Act 1998 (Act No. 122 of 1998)**, permits the use of lethal force while arresting a suspect only when it is necessary to protect the arrestor or someone else from death or grievous bodily harm. The office of Independent Police Complaints Directorate (IPCD) is charged with the function of investigating all deaths in police custody and deaths caused by police action. The number of civilian deaths dropped by 7 per cent from 860 to 797 during the 2010/2011 year according to a report by the IPCD, with the deaths in police custody totalling 257 and those as a result of police action totalling 540. Of the 2,493, complaints lodged with the IPCD alleging criminal conduct by members of the SAPS, 70 per cent concern police brutality. Below is a table highlighting the number of deaths in police custody and caused by police action 2010/2011. Included is the number of cases completed. The target of the IPCD is 65 per cent of cases per year and as shown in the table below, this was achieved in all but one province. However, the number of deaths in police custody remains alarmingly high and more needs to be done to deal with the problem.

Deaths in police custody investigated by the IPCD, 2010/2011

Province	*Deaths recorded*	*Workload (including cases carried over)*	*Cases completed*	*Percentage*
Eastern Cape	109	169	157	93
Free State	36	37	36	97
Gauteng	182	260	219	84

Province	*Deaths recorded*	*Workload (including cases carried over)*	*Cases completed*	*Percentage*
KwaZulu-Natal	248	478	390	82
Limpopo	55	61	59	97
Mpumalanga	56	86	50	58
North West	36	36	36	100
Northern Cape	20	20	20	100
Western Cape	55	129	85	66

78. In **S v Walters (2002) 2 SACR 105 (CC)** the Court declared that potentially fatal force is allowed to be used to arrest a fleeing suspect when they are alleged to have committed a crime involving the infliction of serious bodily harm. In furtherance of the above, the **Prevention and Combating of Trafficking in Persons Bill** has been signed into law by the President on 29 July 2013), aims to bring the provision relating to the use of force in effecting an arrest in line with the Walters case above and ensure greater legal certainty regarding circumstances in which force, especially deadly force, may be used to effect an arrest.

79. With respect to the right to life, the prevalence of fatalities on the countries roads is a noted point of concern. According to the road traffic report March 2011 issued by the Department of transport, the year under review saw an overall reduction of 0.94 per cent in fatal crashes on the roads but the recorded number of fatalities reduced by only 0.86 per cent. The number of fatal crashes per 10,000 motorized vehicles dropped from 12.80 to 12.36 and the number of fatalities per 100,000 people reduced from 28.13 to 27.51. In spite of this reduction in the number of fatal crashes, the figures remain alarmingly high. Some steps have been taken in response, such as road safety awareness campaigns, including the Arrive Alive initiative with various private companies. In recognition of the fact that the right to life does not merely refer to existence, but also involves meaningful participation in the experience of humanity, the Constitution guarantees other rights that are necessary for the enjoyment of a meaningful life. These rights include the right to health care services, housing and the right to an environment that is not harmful to health or wellbeing.

Article 7 – Prohibition of torture

80. South Africa ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 10 December 1998, although no domestic legislation has been enacted. Alongside the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Government is committed to ensuring that individuals are not tortured or subjected to inhuman, cruel or degrading treatment, nor to medical or scientific experiments without their informed consent. In this regard, courts are obligated, in terms of sections 39 and 233 of the Constitution, to enforce constitutional values and standards when dealing with torture and cruel, inhuman or degrading treatment or punishment.

A. Prohibition of cruel, inhuman and degrading treatment or punishment

81. Section 12(1)(e) of the Constitution provides that everyone has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman and degrading way. This is the basis upon which the Constitutional Court invalidated the death sentence and corporal punishment in **S v Makwanyane and Another**

(CCT3/94) [1995] ZACC 3 and **S v Williams 1995 (3) SA632 (CC)** respectively. In the latter case, the Court held that while there may be evidence to show that whipping had some deterrent effect on juvenile criminal behaviour, it was not sufficient to warrant overriding a constitutionally entrenched right. The Court further held that other sentencing options were available and that to continue such an outdated mode of punishment failed to comply with the Constitution's clear commitment to break with the country's violent past and move towards a more caring and humane society. In response to this Constitutional Court decision, the Government adopted the **Abolition of Corporal Punishment Act,1997 (Act No. 33 of 1997)**, the general law outlawing corporal punishment. The **South African Schools Act, 1996 (Act No. 84 of 1996)**, outlawed corporal punishment in schools.

B. Prohibition of torture

82. Torture is not yet recognized as a separate offence under South African criminal law. Any person, including a state official, who commits an act of torture may be charged with the common law offence of assault, assault with intent to commit grievous bodily harm, indecent assault or attempted murder. These offences carry heavy sentences especially if the accused is tried in a Regional Magistrates' Court or the High Court. On 25 July 2013 after the President enacted the Prevention and Combating of Torture Bill into law, before 25 July 2013 any person, including a state official, who committed an act of torture could be charged with the common law offence of assault, assault with intent to commit grievous bodily harm, indecent assault or attempted murder. These offences carry heavy sentences especially if the accused is tried in a Regional Magistrates' Court or the High Court. The **Prevention and Combating of Torture Act**, seeks to give legislative effect to the obligations that South Africa has undertaken under the Convention against Torture. The Act provides for the offence of torture of persons and other offences associated with the torture of persons. Furthermore, it seeks to prevent and combat torture of persons within or across the borders of the Republic of South Africa. Any person who commits torture is liable to imprisonment, including imprisonment for life. The Act gives room for any liability which a person may incur under the common law or any other law (this will include a civil suit by a victim for a civil remedy/redress) against a state organ and/or an agent in the employ of such state organ as a result of torture committed by the agent against the victim. The **Correctional Services Amendment Act, 2008 (Act No. 25 of 2008)**, which abolishes the concept and practice of solitary confinement in all South African correctional facilities and obligates all correctional officers to immediately report all instances where inmates have been placed under mechanical restraint, that is, in handcuffs or leg irons. The total effect of the amendment is that there is now a robust mechanism for detecting and punishing all acts of torture in correctional facilities. Any individual who alleges that he/she or she has been subjected to torture may complain to the South African Police Service, the Independent Complaints Directorate, and the Public Protector and/or the South African Human Rights Commission. A victim of an act of torture may obtain redress and fair and adequate compensation in terms of the common law through delictual claims by bringing a civil action against the perpetrator. For example, in **Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)**, it was held that while common law does not recognize torture as a specific delict, actions comprising torture would fall under assault, and damages relating from such acts could be compensated under the common law.

83. Mechanisms have been put in place to prevent torture and afford redress to victims. The South African Police Service (SAPS), for example, has developed a Policy on the Prevention of Torture and Treatment of Persons in Custody of the South African Police Service (the Police Policy). It sets out a system of checks and balances to protect persons in the custody of the Service from acts of torture, cruel, inhuman or degrading treatment by

members of the Service and also includes guidelines that must be followed when a person in custody is being interviewed. The SAPS is also in the process of developing a system providing for the video and audio recording of interviews with suspects or arrested persons. To ensure the effective implementation of this policy, a number of Standing Orders of the Service were promulgated in 1999 in terms of which no member of the Police Service may torture any person, permit anyone else to do so or tolerate the torture of another by anyone. The same applies to an attempt to commit torture and to an act by any person that constitutes complicity or participation in torture. In the Standing Orders it is clearly evident that no exception, such as a state of war, threat of war, state of emergency, internal political instability or any other public emergency will serve as justification for torture. Any contravention the Standing Orders constitutes misconduct and disciplinary proceedings have to be implemented in respect of it. Such conduct may also incur criminal liability.

84. In view of the implementation of the policy, all stations were issued with the necessary registers, including a Custody Register (SAPS 14) and Notice of Rights in terms of the Constitution (SAPS 14(a)) to ensure the proper treatment of persons and to monitor police activities. The Independent Complaints Directorate has investigated several cases of misconduct by police officers, in 2010/11 at total of 2,477 complaints were received, including 3,603 of cases carried over from previous years. Of which 3,326 were completed indicating a 92 per cent rate of completion, significantly higher than the 55 per cent target. Below are the statistics for torture cases for the period 2005/2006 to 2010/2011.

Statistics for torture cases completed for the period2005/2006 to 2010/2011

Year	*Number*
2005/2006	20
2006/2007	23
2007/2008	20
2008/2009	0
2009/2010	5
2010/2011	41

85. Strategies for the prevention of torture have included training of all members of the SAPS in accordance with the National Human Rights Programme, which has now been incorporated into the Basic Training Programme and the Detective Learning Programme of the Police. The SANDF has also, since 1994,engaged in an active training programme to inculcate the principles of International Humanitarian Law that specifically addresses issues of torture. The Government has established a Judicial Inspectorate as an oversight body to receive and monitor complaints of torture. The independent Inspectorate reports all incidents to the Minister of Correctional Services and to Parliament.

86. **The Correctional Services Act** embodies the Constitutional guarantee of the right to humane treatment of persons deprived of their liberty. This includes the right not to be tortured. This Act also provides that sentenced offenders are supposed to work so as to learn the habits of industry and labour. However, the challenge is overcrowding in correctional facilities. The building of new prisons is being expedited. Concerted efforts are being made to upgrade existing structures to alleviate overcrowding in correctional facilities.

87. In terms of section 35(5) of the Constitution, evidence obtained by torture may be excluded from trial – **S v Hoho 1999 (2) SACR 159 (CPD); S v Malefo and Others 1998 (1) SACR 126 (WLD); S v Potwana 1994 (1) SACR 159 (A)**. More recently, the Supreme Court reiterated the prohibition of evidence obtained through torture in **Mthembu v the**

State (2008) ZASCA 51 (10 April 2008), in which the Court relied on the definition of torture contained in Convention against Torture. The Court held that the admission of evidence induced by torture had the potential of corroding the criminal justice system. Such evidence must, therefore, be excluded in the public interest.

88. On 7 July 2008, Mr Bradley McCullum lodged a complaint with the Human Rights Committee in relation to an incident on 17 July 2005 while he was incarcerated. McCullum alleged violations by South Africa of articles 7 and 10, read in conjunction with article 2, paragraph 3, of the Covenant. On 2 November 2010, South Africa was found to have violated these provisions of the Covenant in relation to the treatment of Mr McCullum, in the absence of any representations by the South African Government in response to the allegations. The Committee held that South Africa violated article 7 of the Covenant and failed to provide effective remedies to the complainant (article 2), and that there was no speedy response to the complainant's request for a medical examination (article 10). The Government published the Committee's findings and acknowledged its failure to participate in the processes of the Committee by placing advertorials in national newspapers on 2 October 2011. The advertorials outlined the Committee's findings and the actions taken by the Government.

89. The DCS has reopened the investigation into the actions of its officials on 17 July 2005.Investigations into the conduct of senior departmental officials, who overturned the recommendations of the investigator in 2005 as well as that of the medical personnel at the St Albans Correctional Centre, will be launched. The recently opened police investigation into the McCullum case was submitted to the National Prosecuting Authority for a decision on whether to prosecute or not. The National Prosecuting Authority has withdrawn the case, as there was inadequate evidence for prosecution.

C. Medical and scientific experiments

90. Section 12(2)(c) of the Constitution provides that everyone has the right to bodily and psychological integrity, which includes the right not to be subjected to medical or scientific experiments without informed consent with the overriding requirement being the informed consent on the part of the participants. Sections 7 and 8 of the **Employment Equity Act, 1998 (Act No. 55 of 1998)** prohibits the medical testing of an employee unless legislation permits or requires the testing. Medical testing of an employee is also justified where medical conditions so require or the inherent requirements of the job so demand.

91. Research on and experimentation with humans and human material is regulated and controlled by the **South African Medical Research Council Act, 1991 (Act No. 58 of 1991)**. The Act establishes the Medical Research Board, which is charged with the determination of ethical directives that shall be followed in research or experimentation. The Board takes such control measures as it may deem necessary in order to ensure that the ethical directives are complied with. In this regard, the Board has entrenched human rights as a core value in health research, which highlights the critical role ethics plays in the conduct of research. In line with the Bill of Rights, the Board issued a new edition of **Guidelines on Ethics for Medical Research** in 2003, which ensures that the concept of the best interest of the research participant is clear. No cases dealing with medical and scientific experimentation without the informed consent of the participants have been reported during the period under review. However, in at least one case, the results of HIV preventive research trials were published without the consent of the research participants – **NM and Others v Smith and Others 2007 7 BCLR 751 (CC)**. The Constitutional Court found such unauthorized disclosure to constitute a violation of the participants' rights to privacy, dignity and psychological integrity.

Article 8 – Prohibition of slavery, servitude and forced labour

92. South Africa has signed and ratified both the Slavery Convention of 1926 and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956. As such, it has undertaken to ensure that individuals within its jurisdiction are not subjected to slavery, servitude or forced labour. In this regard, section 13 of the Constitution stipulates that no one may be subjected to slavery, servitude or forced labour. The substantiation of this right is achieved through a number of statutes, section 48 of the **Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997)**, prohibits forced labour and makes it a criminal offence.

93. In relation to children, sections 28 (1)(e) and (f) of the Constitution provide that every child has the right to be protected from exploitative labour practices and not to be required or permitted to perform work or provide services that are inappropriate for a person of that child's age or place at risk the child's wellbeing, education, physical or mental health or spiritual, moral or social development. In order to comply with section 28(1)(e) of the Constitution, the Directorate of Social Work Services has developed a Policy on Child Offenders which provides that child offenders may not be subjected to labour that is inappropriate to their age or that can impact negatively on their educational, physical, mental and social wellbeing. The **Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997)** includes a chapter on children and forced labour. It prohibits the employment of children under the age of 15. The Act also contains provisions for the criminal enforcement of the prohibition on child labour and protects children between the ages of 15 and 18 who are employed. The Act enables the Minister of Labour to make regulations prohibiting or placing conditions on the employment of such children.

94. In relation to prisoners, the **Correctional Services Act** provides that sufficient work must, as far as practicable, be provided to keep prisoners active for a normal working day and a prisoner may be compelled to do such work. However, a prisoner may never be instructed or compelled to work as a form of punishment or disciplinary measure. Offenders are afforded the opportunity to participate in the choice of labour they wish to perform through participating in their needs assessments and in planning to serve their sentences. The 2011/12 Performance Plan of the DCS requires that 40 per cent of qualifying sentenced offenders should work, to learn the habits of industry and labour. Thus offenders obtain job skills to enter the job markets after their release from custody.

Article 9 – Right to liberty and security of the person

A. Prohibition of arbitrary arrest and detention

95. In essence, sections 12(1)(a) and (b) of the Constitution embody the substantive component of the right to freedom, that is, they are concerned with the reasons for which the state may deprive someone of freedom –**S v Coetzee1997 (3) SA 527 (CC)**. In this regard, the state may deprive an individual of his/her liberty only when there is a rational connection between the deprivation and some objectively determinable purpose.

96. A majority of persons who are deprived of liberty in South Africa are those awaiting trial for alleged criminal offences or those already serving their sentences in prison. There are, however, a smaller number of persons who are deprived of their liberty for reasons other than the commission of criminal offences. The **Mental Health Act, 1973 (Act No. 18 of 1973),** for instance, provides for the incarceration of patients with mental disability in mental hospitals. Similarly, the **National Health Act, 2003 (Act No. 61 of 2003),**

empowers the provincial Minister of Health to order the detention of a patient for purposes of managing, preventing and controlling a communicable or non-communicable disease. The lawfulness of such incarcerations must be objectively justified –**Minister of Safety and Security v Tobani 2003 (5) SA 126 (ECD)**. In other words, such detentions are permissible to the extent that they are justifiable limitations of the right to liberty. Thus in **Minister of Health of the Province of the Western Cape v Goliath and Others (13741/07) (2008) ZAWCHC 41 (28 July 2008)**, it was held that involuntary admission of extreme drug resistant TB patients to chest hospitals and isolation units was justifiable even though it necessarily involved some intrusion upon the individual liberty of the patients concerned. Similarly, in **Lawyers for Human Rights v Minister of Home Affairs 2004 (4) SA 125 (CC)**, it was held that the detention of illegal foreigners at ports of entry prior to deportation is justifiable.

B. Rights of an arrested person

97. Section 35(1) of the Constitution embodies the procedural component of the right to freedom, that is, the manner whereby a person is deprived of freedom. In other words, it requires the state, when it deprives its citizens of freedom for acceptable reasons, to do so in a manner that is procedurally fair. It provides that everyone who is arrested for allegedly committing an offence has the right to remain silent and be informed promptly of this right and the consequences of not remaining silent; to not be compelled to make any confession or admission that could be used in evidence against that person; be brought before a court as soon as reasonably possible, but not later than 48 hours after the arrest; at the first court appearance after being arrested, to be charged or informed of the reason for the detention to continue, or be released; and to be released from detention if the interests of justice permit, subject to reasonable conditions. Other relevant rights guaranteed by the Constitution is the right to human dignity, humane treatment of detainees, healthcare services and a fair trial and legal assistance at state expense.

C. Security of the person

98. The level of violence, sexual assault and rape against women and children, including that of lesbians, gays, bisexuals, transgender and intersex persons (LGBTIs),is a challenge. The fight against criminality in South Africa, including transnational organized crime and corruption, is the mandate of the Justice, Crime Prevention and Security (JCPS) Cluster, both at the level of directors-general and ministers. The fight against crime and corruption is one of the priorities of the Government. The theme of this priority is "All People in South Africa are and feel safe". Key deliverables under this priority, for 2009 to 2011, are reduced overall levels of serious crime, in particular contact and trio crimes (housebreaking, robbery and car hijacking); an effective criminal justice system; and combating corruption, to ensure effectiveness of the JCPS Cluster. A number of statutes have been adopted to fight national and transnational crime and corruption. **We have the Prevention of Organized Crime Act, 1998 (Act No. 121 of 1998); Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004); Firearms Control Act, 2000 (Act No. 60 of 2000); National Conventional Arms Control Act, 2002 (Act No. 41 of 2002); and Financial Intelligence Act, 2001 (Act No. 38 of 2001)**,which deals with money laundering. **The Criminal Procedure Act** provides for rules of procedure in dealing with criminality from the investigation and trial stages. We have the Directorate on Priority Crime Investigation (also known as the Hawks), the National Prosecuting Authority with the Priority Crime Unit and Asset Forfeiture Unit, and other agencies to fight corruption. These are complemented by other institutions or agencies established to fight violence

against women, children and LGBTIs. As already indicated above, the JCPS Cluster's main role is to deal with policy.

99. There are special measures to protect the security of women, children and LGBTIs. We have the Domestic Violence Act; Children's Act, 2005 (Act No. 38 of 2005); and the Criminal Law (Sexual Offences and Related Matters) Amendment Act, which seek to fight violence and sexual abuse perpetrated against women, children and LGBTIs. Registers on sexual offenders and children abusers have been developed to protect women and children respectively. In order to improve the handling of rape cases by police, the SAPS makes use of specialized investigative units called Family Violence, Child Protection and Sexual Offences (FCS) units. All FCS units became fully operational on1 April 2011. We have the Thuthuzela Victims' Care Centres (one-stop centre for victims of sexual abuse), which form part of initiatives relating to the Victims Empowerment Policy. The 16 Days of Activism **for No Violence Against Women and Children** held every November is one of the key programmes to protect vulnerable groups from violence and sexual abuse. The Ministry of Justice and Constitutional Development has launched the National Task Team on Lesbian, Gay, Bisexual, Transgender and Intersex people (LGBTIs).This team is mandated to develop a national intervention strategy on crime directed at LGBTIs, such as rape, murder and discrimination. Training and development sessions for court officials were conducted and public -awareness and education campaigns were held on issues of LGBTIs. Special Sexual Courts are to be reconstituted to deal with the plight of women, children and LGBTIs.

100. As shown by recent statistics and a survey of the Police in September-November 2011, there is a marked reduction in serious crime such as murder. However, the fight against corruption is a challenge, including improvement of cyber security. The required information and communication technologies to modernize the justice system is still a major challenge. In essence the perception of crime has been reduced to a certain extent, although the level of crime and corruption remains a challenge for South Africa. Steady progress has been made in addressing the situation of vulnerable groups, although lack of resources and other challenges hamper the initiatives, which include:

- Implementation of the Child Justice Act, 2008 (Act No. 75 of 2008), and Child Justice National Policy Framework;
- Implementation of the National Register for Sex Offenders;
- Development of an intervention strategy to address gender violence and violence based on sexual orientation against LGBTIs.

Article 10 – Right to humane treatment when deprived of liberty

101. Section 35(2) of the Constitution guarantees the right of all persons deprived of their liberty within South Africa to be treated with humanity and with respect for their inherent dignity. A number of statutes provide the legislative and institutional framework conducive to the realization of this right in practice.

A. Humane treatment of all persons deprived of their liberty

102. A large percentage of persons deprived of their liberty in South Africa are those who are either accused of criminal offences or are already serving their sentences upon conviction. section 35(2)(e) of the Constitution states that detained persons including sentenced prisoners have the right to "conditions of detention that are consistent with

human dignity, including at least exercise and the provision of, at state expense, adequate accommodation, nutrition, reading material and medical treatment". The central statute that seeks to ensure the implementation of this constitutional guarantee is the **Correctional Services Act**. The overall objective of the Act is to ensure that persons deprived of their liberty – mainly accused and convicted persons – are treated with dignity.

103. In particular, the Correctional Services Act enumerates the minimum rights of prisoners which, according to section 4 of the Act, must not be violated or restricted for disciplinary or any other purpose. These rights include the right to be kept in cells which meet the requirements for human dignity; the right to be provided with adequate diet to promote good health; the right to be provided with the means to keep his/her person, clothing, bedding and cell clean and tidy; the right to be provided with clothing and bedding sufficient to meet the requirements of hygiene and climatic conditions. Here, mention must be made of the case of **B and Others v Minister of Correctional Services and Others1997 (6) BCLR 789 (CC)**, in which the Constitutional Court held that the failure by the DCS to provide antiretroviral medication to HIV-positive prisoners amounted to an infringement of their rights and ruled that the Department should provide HIV-positive prisoners with the drugs if so prescribed by a doctor. The right to maintain contact with the community and to be visited at least by their spouses or partners, next of kin, a chosen religious counsellor and chosen medical practitioner is also protected.

104. During 2011/2012, 158,790 inmates were housed in correctional centres. The two general categories of inmates are sentenced offenders and remand or awaiting-trial detainees whose cases have yet to be finalized. Approximately 29 per cent (46,062) of the total number of inmates were remand detainees, while sentenced offenders constituted 71 per cent (112,784) of the total prison population.

105. A major problem in South African prisons is overcrowding. Overall levels of occupation were 134.39 per cent of official capacity. However, these overall statistics do not reflect the differences between the various correctional facilities in the country. Some facilities have very low occupancy (around 20 per cent), while others are severely overcrowded. These include the Johannesburg Medium B and King William's Town facilities, which had occupancy levels of 273 per cent and 242.52 per cent, respectively, on 31 March 2012.

106. The following initiatives have been put in place in an attempt to relieve overcrowding. A Justice Crime Prevention and Security (JCPS) Cluster Overcrowding Task Team was established to identify issues that result in overcrowding. The work of this team has been taken over by the Integrated Justice System Development Committees, its substructure the Case Management Task Team and the Intersectoral Committee on Child Justice (ICCJ). The **Correctional Matters Amendment Act, 2011 (Act No. 5 of 2011)**, legislates the possible placement on parole of offenders serving sentences of 24 months or shorter after serving one -quarter (previously one-half) of the sentence, as well as commuting sentences to compulsory minimum sentences after one-half (previously four-fifths) of time served. This introduction of these measures is receiving attention.

107. Since 2004, the DCS has implemented a multipronged strategy, which includes the **Correctional Matters Amendment Act**. The Act brought about amendments to ensure improved management of remand detainees, especially vulnerable groups such as the mentally ill, aged and pregnant women. An important way to relieve overcrowding in the correctional system is by managing the levels of remand detainees.

108. The effective use of section 62(f) of the **Criminal Procedure Act**, which allows for a court to release an accused on bail with the provision that the accused is supervised by a probation officer or a correctional official (via the community correction offices), is actively propagated. It is hoped that more awareness of this section will alleviate the

concerns of courts when deciding whether to grant bail and thus ensure that more accused are granted supervised bail instead of becoming trial remand detainees in correctional centres.

109. This Act was further amended by Act No. 5 of 2011 and substantially expands the legislative framework governing remand detainees. The latest amendment has yet to come into force, but improves in a number of ways the legal framework regulating remand detainees. The remand population in South African constitutes 29 per cent of the total population; with 70 per cent of these remand detainees being held in severely overcrowded prisons. Despite the female prison population constituting only2.3 per cent of the total population, the majority of female prisoners are held in overcrowded prisons. As at end of March 2012, 29 per cent of female inmates were awaiting trial.

110. According to section 63A of the **Criminal Procedure Act**, a Head of Correctional Centre may apply to a court to release certain remand detainees if the conditions in the correctional centre will result in a material threat to the human dignity, physical health or safety of the accused, or the accused is charged with an offence in which a police official may grant bail, or if the accused was granted bail by the Court but could not afford to pay the bail amount.

111. Implementing this multipronged overcrowding strategy and working with criminal justice partners to improve diversion options and provide additional bed spaces, the DCS managed to decrease the overcrowding rate of 37.91 per cent during 2007/08 to 34 per cent during 2010/11, and maintained the rate at 34 per cent during 2011/12, against a target of 38 per cent.

Number of children (<18 years) detained in facilities, by sentencing status, 2003/04 against 2011/12

Status	*March 2003*	*April 2012*
Sentenced	1,810	419
Unsentenced	2,334	206
Total	**4,144**	**625**

112. Since 2003, there has been an 85 per cent reduction in children awaiting trial in correctional facilities and an increase in the number of children awaiting trial in secure care facilities or under home-based supervision. Children's cases have also been expedited through the criminal justice system, with the result that only 29 per cent of children await trial for longer than three months. Thus, 71 per cent of children's cases are managed within three months. The DCS has established the first state -sponsored halfway house (Naturena) in Johannesburg, where youth offenders without support systems are housed in order to ensure their successful reintegration into society while maintaining their human dignity and respect. The DCS obtained a legal opinion to confirm that this system will not infringe on the privacy and human dignity of offenders. A pilot project was launched in 2012 to electronically monitor offenders subject to community corrections. This is major milestone on the African continent.

113. According to international norms, offenders must have access to the same quality and range of healthcare services as the National Health Service offers the general public. One of the main goals is reducing child mortality. The DCS aims to deliver timely treatment for newborns, expanded immunization programmes, and infant and young child feeding where applicable. The services provided to pregnant female inmates are constantly monitored and evaluated. Interventions have also been implemented to prevent diseases such as HIV/AIDS, TB, STIs and malaria. These include HIV counselling and testing,

condom distribution, the training of inmates to establish support groups and increased access to antiretroviral treatment.

B. Accused persons to be segregated and receive separate treatment from convicted persons

114. The **Correctional Services Act** makes a distinction between sentenced and un-sentenced prisoners. According to section 7(2) of the Correctional Services Act, sentenced prisoners must be kept separate from un-sentenced prisoners. section 46 of the same Act provides that unsentenced prisoners may only be subjected to those restrictions necessary for the maintenance of security and good order in the prison. They must, where it is practical, be allowed all the amenities to which they could have access outside prison. These prescriptions are adhered to in all correctional centres in the country.

115. The question of segregation of accused persons from convicted persons in detention facilities has found judicial endorsement. In **Zealand v Minister for Justice and Constitutional Development 2008 (6) BCLR 601 (CC)**, the Constitutional Court, expressly relying on article 10, paragraph 2, of the Covenant, held that respect for fundamental human dignity demands that the fundamental difference in status between accused persons and convicted persons be always recognized, and that it be reflected in prisons wherever possible. As such, in this case, the applicant's detention in a maximum-security prison while he was an accused person was found to be a deprivation of his freedom.

C. Reformation and social rehabilitation

116. The primary function and objectives of the DCShave shifted from an emphasis purely on safety and security to the reformation and social rehabilitation of prisoners. In this regard, sentenced prisoners may elect the type of work they prefer to perform, if such choice is practicable and in accordance with an appropriate vocational programme. Such a sentenced prisoner may receive a gratuity in respect of the work performed.

117. Furthermore, section 50(1)(a) of the Correctional Services Act states the objectives of community corrections as follows:

> "(i) To afford sentenced offenders an opportunity to serve their sentences in a non-custodial manner;
>
> (ii) To enable persons subject to community corrections to lead a socially responsible and crime-free life during the period of their sentence and in future;
>
> (iii) To enable persons subject to community corrections to be rehabilitated in a manner that best keeps them as an integral part of society; and
>
> (iv) To enable persons subject to community corrections to be fully integrated into society when they have completed their sentences.".

118. Offenders placed in the system of community corrections are subject to certain conditions in accordance with section 52. These conditions may include:

- House detention;
- Monitoring;
- Performance of community services;
- Restriction to magisterial district.

119. A supervision committee is established at each community correction office as prescribed by regulation. The objectives of this committee include the following:

- To determine the level of supervision for each person subject to community corrections;
- To review its determination at regular intervals;
- To review the extent to which the objectives of community corrections are achieved and decide whether the means and level of supervision applied to such a person should be modified.

120. The current community corrections population of inmates in the correctional centres stands at approximately 160,000. These inmates are managed by 2,070 community corrections officials nationally through 240 community corrections offices.

121. The DCS has formalized partnerships with external organizations through memoranda of understanding and service -level agreements, for example institutions of higher learning, in order to conduct community profiling. The community corrections profiling tool was developed to understand the community from which offenders come in order to promote their successful reintegration into the community.

122. Under section 13 of the **Correctional Services Act**, the DCS is obliged to encourage prisoners to maintain contact with the community and enable them to stay abreast of current affairs. The prisoners are also entitled to access reading materials and newspapers in terms of section 18 of the same Act. In addition, the Constitution, at section 35(f), and the **Correctional Services Act** at section 13 allow prisoners to be visited by family members and others to ensure that they share in humanity.

123. The DCS makes concerted efforts to provide need -based care programmes aimed at maintained the wellbeing of all incarcerated persons. The services provided by the Department largely consist of two streams. The first consists of all activities related to the management of psychological, spiritual, health, social and HIV/AIDS issues for all inmates. These include the provision of therapy, life skills and HIV/AIDS counselling to inmates. The second stream focuses on skills development for inmates, including entrepreneurial training, computer skills training, vocational training, engineering studies and business studies. The Department also facilitates the participation of inmates in formal education at different levels, from adult basic education to higher education. Pre-literacy and adult education programmes are offered up to the Grade 12 level of all public schools. These costs are all carried by the DCS. Tertiary education is encouraged. The cost is the detainee's responsibility, although the establishment of funding schemes has commenced. In the 2011 academic year 18,989 offenders participated in educational programmes, and the average pass rate for Grade 12 learners was 68 per cent.

D. Detention and treatment of juvenile offenders

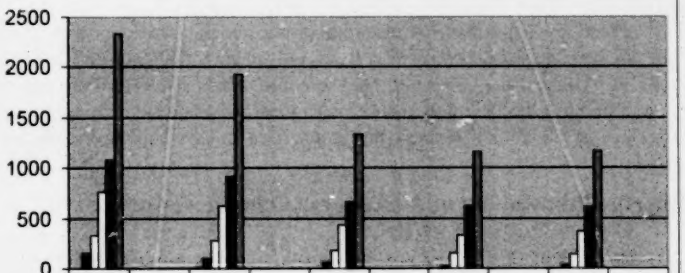
124. Section 28(g) of the Constitution stipulates that a child should not be detained except as a measure of last resort and only for the shortest appropriate period of time. Upon detention the child is entitled, in addition to the rights that generally accrue to detained persons, the right to be kept separately from detained persons over the age of 18 years and the right to be treated in a manner, and kept in conditions, that take account of the child's age. These constitutional guarantees are reflected in section 7(2)(c) of the Correctional Services Act and in this light, it has been judicially stated that while the imprisonment of children is not prohibited, it must be done for the shortest time, the child must be kept away from incarcerated persons over the age of 18 years and that the child's best interest is paramount in deciding to imprison a child – **S v Nkosi 2002 (1) SA 494 (W)**.

Proportionality of the sentence is also important. It has also been held that before commencement of the trial of a juvenile, the Court must, in appropriate circumstances, promote the enrolment of the accused in a juvenile diversion programme – **S v Z en Vier Ander Sake 1999 (1) SACR 427 E.**

125. In addition, several legal safeguards and practices seek to ensure that children deprived of their liberty are protected from abuse, including a duty on police to notify parents and guardians that a child has been arrested and to notify a probation officer of every child's arrest as soon as possible after the arrest has been effected. A magistrate before whom a child (of 14 years or older) appears has the discretion to send them to prison, if the child is charged with any other offence and if the magistrate is of the view that the circumstances are so serious as to warrant such detention. These discretionary cases (often referred to as "non-scheduled offences") account for approximately 50 per cent of children awaiting trial in South African prisons. Magistrates can also and do set bail for children who are imprisoned and if child is placed in prison, he/she or she must be brought back before the Court every 14 days. Correctional Services staff is also specifically trained on the handling of juveniles. Juvenile-specific programmes are being developed, ensuring their involvement in meaningful activities.

126. The ISCCJ established in 1995 is charged with the task of looking into matters that concern the detention and treatment of child offenders. In particular, the Children Awaiting Trial Task Team, which is a subcommittee of the ISCCJ, meets more regularly to monitor case cycle times for the finalization of children's cases, to track children and ensure that they spend the least amount of time awaiting trial. In between monthly meetings, communication is promoted at least on a weekly basis.

127. Between 9 000 and 13,000 children are arrested countrywide on a monthly basis. Overall, 47 per cent of children are arrested because of economic crimes. In the present reality of child-headed and elderly -headed households, this clearly indicates that the social crime prevention initiatives need to receive more attention to prevent contact with the criminal justice system. The table below represents the average annual total of the juvenile awaiting-trial detainees detained in DCS facilities from 2003 to 2007.



	2003		2004		2005		2006		2007	
7-13yrs	6	0.001	8	0.016	3	0.006	3	0.007	4	0.008
14 yrs	147	0.027	96	0.187	61	0.129	29	0.064	36	0.075
15 yrs	335	0.062	276	0.539	184	0.389	154	0.342	141	0.293
16 yrs	763	0.141	625	1.22	429	0.907	336	0.745	374	0.778
17 yrs	1083	0.2	919	1.795	659	1.393	627	1.391	612	1.273
Total Juveniles	2334	0.432	1923	3.755	1336	2.824	1149	2.549	1166	2.426

Source: Management Information System of the Department of Correctional Services.

128. According to the table above, the average annual number of juvenile awaiting-trial detainees has been gradually dropped for the period of five years from 2003 to 2007. However, the annual percentage averages did not reflect a similar pattern. The percentage pattern reflects an increase in 2004 and a gradual pattern of decrease from 2004 to 2007. The 17-year age category had the highest average number of juveniles with a range of between 612 and 1,083 awaiting-trial detainees. The annual average for the juveniles below the age of 14 years remained below 10 (less than 0.2 per cent) for a period of five years. There has been a noted downward trend and in June 2010, when only 297 children were awaiting trial in prisons.

Article 11 – Imprisonment for debt

129. Until 1997, sections 65F and 65H of the **Magistrates' Courts Act, 1944 (Act No. 32 of 1944)**, provided for civil imprisonment for a period of not more than 90 days under certain circumstances on the basis of failure or inability to fulfil a contractual obligation of a judgment debtor in certain circumstances. In 1997, however, these sections were repealed with the enactment of the **Magistrates' Courts Amendment Act, 1997 (Act No. 81 of 1997)**. The repeal of these sections was in compliance with the Constitutional Court's judgment in **Coetzee v Government of the Republic of South Africa1995 (4) SA 631 (CC)**. In this case the Constitutional Court held that that poverty and lack of financial means cannot justify the putting of a person in jail. In **De Lange v Smuts NO 1998 (3) SA 785 (CC)**, the Constitutional Court held that section 66(3) of the **Insolvency Act, 1936 (Act No. 24of 1936)**, which provides for the committal of examinees who refuse to provide information about an insolvent's affairs, serves an important public objective that is, to ensure that legitimate goals of the insolvency laws are achieved and creditors are protected but should only be commissioned for legitimate reasons. At the moment therefore no one can be put in prison merely for failing to fulfil a contractual obligation.

Article 12 – Freedom of movement

130. There are legislative, administrative and judicial measures that have been put in place to guarantee and protect liberty of movement of all persons lawfully within the Republic. The measures cover both the "internal" aspects of freedom of movement (that is, the right to move freely and to choose one's place of residence within the borders of South Africa) and the "external" aspects (that is, the right to leave and return to South Africa).

A. Liberty of movement and freedom to choose residence

131. In terms of section 21(a) of the Constitution, everyone has the right to freedom of movement. This right is available to citizens and non-citizens alike save for the fact that non-citizens must, in the first instance, be lawfully within the Republic to enjoy this right. Under section 21(c) of the Constitution, all citizens are entitled to the right to "enter, to remain in and reside anywhere in, the Republic".

132. While lawfully in the Republic, non-nationals are entitled to all fundamental rights and freedoms contained in the Constitution, save for those that exclusively accrue to citizens. Accordingly, just like citizens, they are entitled to state protection in their enjoyment of these rights. In **De Lange v Smuts 1998(7) BCLR (CC)**, Ackermann J noted: "In a constitutional democratic State, which is now certainly ours, and under the rule of law, citizens as well as non-citizens are entitled to rely upon the State for the protection and

enforcement of their rights. The State therefore assumes the obligation of assisting such persons to enforce their rights." Thus in **Baloro and Others v University of Bophuthatswana and Others1995 (4) SA 197 (BOP)**, the decision of the Interim Council of the University of Bophuthatswana placing a moratorium on promotions of non-South African academic staff with valid contracts of employment, while promoting staff members with South African citizenship was declared by the Court as a gross violation of section 8(2) of the Constitution which enjoins both natural and juristic persons to respect the Bill of Rights.

133. Non-nationals, however, do not enjoy political rights, the right to enter, remain in and reside in South Africa or the right to choose trade, occupation or profession freely. They enjoy these rights only in terms of regulations obtaining under domestic laws. Non-nationals, for example, may not take up jobs in certain spheres of the security sector. As an exception, non-nationals who have attained permanent residence permits are entitled to certain rights that would ordinarily not accrue to non-nationals. Under the **Electoral Act** and Schedule 4 of the **Local Government Transition Act, 1993 (Act No. 209 of 1993)**, for instance, non-nationals who are permanent residents in South Africa are allowed to vote in elections. Permanent residents, as was held by the constitutional Court in **Khosa and Others v Minister of Social Development 2004 (6) SA 505 (CC)**, are also entitled to social grants if they meet the criteria of benefiting from such grants.

134. The entry of non-nationals, especially asylum seekers and refugees, into South Africa must be given special mention here. The entry of foreign nationals into South Africa is regulated under the **Immigration Act, 2002 (Act No. 13 of 2002)**, which was amended in 2007 through the **Immigration Amendment Act,2007 (Act No. 3 of 2007)**. The amendment provides for the clarification and revision of procedures and permits with regard to admission of non-nationals into South Africa. The amendments in general seek to ensure expediency and efficiency in the migration control process.

135. For both nationals and non-nationals, the issue of illegal land occupation is relevant and must be made mention of. The Constitutional Court in **City Of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd(2011) ZACC**, dealt with the eviction of illegal occupiers from private premises. The Court held that according to section 25(1) of the Constitution "no one may be deprived of property except in terms of a law of general application and no law may permit arbitrary deprivation of property". Further, the right to access adequate housing is protected in section 26 of the Constitution, which recognizes housing as one of the functional areas of concurrent national and provincial legislative competence.

136. Local government has a serious role to play in this aspect, and a municipality's role in relation to housing must be determined by reference to the Constitution and various enactments. section 153 (a) provides that a municipality must structure and manage its administration and budgeting and planning process to give priority to the basic needs of the community and to promote the social and economic development of the community. The principal instruments enacted to give effect to the constitutional obligations of the various organs of state in relation to housing are the **Housing Act, 1997 (Act No. 107 of 1997)**, and the National Housing Code. The **Housing Act** expressly gives effect to the Constitution under section 9, which obliges municipalities, as part of the process of integrated development planning, to take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to ensure among other things, that the inhabitants of their respective areas have access to adequate housing.

137. The National Housing Code was enacted under section 4 of the Housing Act. It sets out the principles, guidelines and standards that apply to the various programmes affected by the state in relation to housing. Chapter 12 of the code, titled "Housing Assistance in

Emergency Housing Circumstances" provides for assistance to people who find themselves in a housing emergency for reasons beyond their control.

138. Evictions from land are dealt with as per **Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, 1998 (Act No. 19 of 1998)**. Section 4, concerning eviction of unlawful occupiers by an owner of a person in charge of land, provides that courts may only grant an order for eviction if it is just and equitable to do so and after considering all the relevant circumstances. Where an unlawful occupier has occupied the land for more than six months, those circumstances include the availability of alternative land where the occupier may be relocated. A just and equitable date for eviction must be determined. The duty regarding housing in section 26 of the Constitution falls on all three spheres of government, which are obligated to cooperate. In **Government of the Republic of South Africa and Others v Grootboomand Others 2000 (11) BCLR1169** the Constitutional Court made it clear that a coordinated state housing programme must be a comprehensive one determined by all three spheres of government in consultation with each other, and that each sphere of government must accept responsibility for the implementation of particular parts of the programme.

B. Asylum seekers and refugees

139. In relation to asylum seekers and refugees, the **Refugees Act, 1998 (Act No. 130 of 1998)**, provides an elaborate normative and institutional framework for the regulation of their entry into and stay in South Africa. In **Baromoto v Minister of Home Affairs 1998(4) BCLR** it was stated that "if the applicants [asylum seekers from the former Zaire] qualify as refugees, notwithstanding the settled intention of the Government of South Africa, the applicants will be entitled to be dealt with as refugees and would remain in South Africa subject to the provisions of the OAU Convention".

140. People with refugee status may not be refused entry into the Republic, expelled, extradited or returned to a country where they will be subjected to persecution on account of their race, religion, nationality, political opinion or membership of a particular social group, or where their life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing public order in either part or the whole of that country (section 2 of the Refugees Act). section 4 of this Act lists the grounds for refusing refugee status and includes commission, by the applicant, of international crimes and ordinary crimes punishable by imprisonment. A person enjoying the protection of any other country will not qualify as a refugee.

141. While the process of applying and obtaining refugee status had long been riddled with numerous difficulties, the **Refugees Amendment Act, 2008 (Act No. 33 of 2008)**, now infuses expediency in the process. The Act dissolved the Standing Committee for Refugee Affairs and the Refugee Appeal Board established under the Refugees Act. To replace these two bodies, the Refugee Appeals Authority is created with the primary duty to receive and consider appeals arising from persons applying for refugee status within the Republic. The Refugees Amendment Act also freshly outlines the rights of refugees and asylum seekers which includes full legal protection except those rights that only apply to citizens. An asylum seeker, on the other hand, is entitled to the rights contained in the Constitution in so far as they apply to an asylum seeker.

C. Extradition

142. The **Extradition Act, 1962 (Act No. 67 of 1962)**, (as amended by Act 77 of 1996) serves as enabling legislation governing extradition in South Africa. The Act provides for

three categories of persons who may be extradited. First, a person accused or convicted of an offence included in an extradition treaty between South Africa and the foreign state and committed within the jurisdiction of the foreign state. Second, if the President consents to the extradition in writing, a person accused or convicted of an extraditable offence in the territory of a state with which no extradition treaty exists. Third, any person accused or convicted of an extraditable offence committed within the jurisdiction of a designated state. The Act contains no prohibition on the extradition of South African nationals to a foreign state or on the extradition of the nationals of a third state from South Africa to another state. Any such limitation must, therefore, be sought in a treaty and may vary from an absolute prohibition to a discretion accorded to the state either to extradite the individual sought or to punish him or her itself. In the event of a discretionary clause, South Africa has discretion to refuse to extradite its nationals, although it has never refused to do so.

143. There is no extradition treaty to which South Africa is a party that contains a specific clause prohibiting extradition on humanitarian grounds. However, the Minister of Justice and Constitutional Development has discretion in terms of section 11 of the Extradition Act to refuse extradition where it is not required in good faith and it is not in the interests of justice, or where, for any other reason, and having regard to all the circumstances of the case, extradition would be unjust or unreasonable or too severe a punishment. The possibility that a person might be tortured if extradited covers this type of case. The Extradition Act provides a further category in terms of section 11 based on the potential violation of the basic rights of the person to be extradited. The Minister has discretion to refuse extradition where the Minister is satisfied that the extradited person will be prosecuted, punished or prejudiced at his/her trial in the foreign state because of gender, race, religion, nationality or political opinion.

144. The Extradition Act makes no mention of the death penalty as a ground for refusal of extradition. However, an exclusionary clause occurs in certain of the Republic's bilateral treaties. For example, in terms of article 5, paragraph 1, of the Extradition Treaty between the Government of the Republic of South Africa and the Government of the United States of America, South Africa will clearly decline surrender of a person to a foreign jurisdiction where the death penalty is a competent form of punishment.

145. **The** new **Extradition Bill**, comprehensive in nature, seeks to repeal the existing Extradition Act with a view to aligning extradition arrangements with modern trends.In September 2013 the draft Bill was submitted to Minister to obtain his views on the draft Bill before approaching Cabinet for approval to begin the consultation process.The Bill seeks to extend extradition to entities (e.g. international criminal tribunals such as the International Criminal Tribunal of Rwanda, or other similar body). However, it excludes the International Criminal Court, established by the 1998 Rome Statute, which is given effect by the **Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act No. 27 of 2002)**, have, among others provisions on surrender tailor made for this Court only. The new Extradition Bill also seeks to provide for speedy extradition processes that take into account the human rights of suspects.

D. Xenophobia

146. Our country is a major economic centre in the SADC and Africa. It therefore attracts a huge flow of immigrants and encounters a number of concomitant challenges, such as illegal entry into the country, identity theft by immigrants, false marriages, competition for employment and basic services, and fraudulent acts. Furthermore, we have experienced the emergence of xenophobia in recent years as evidenced by continued violent acts against immigrants. Recognizing the dangers that violent acts of xenophobia constitute for the stability of South Africa, numerous efforts have been made to counter xenophobia,

including the 1998 Roll Back Xenophobia Campaign. This campaign was launched to raise awareness of the plight and rights of migrants among civil servants or social services providers, the police and immigration authorities. Seminars and training workshops were held to educate the media on these issues, and a campaign on radio and television programmes was conducted to educate the public and promote awareness of the importance of preventing xenophobia. In 2001, the South African Government hosted and chaired the Third World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR). Despite these efforts, xenophobia remains a problem in South Africa, as evidenced by the violent and fatal attacks of foreigners of African origin in May 2008.

147. These attacks against foreign nationals were followed by a swift response by the Government, especially the police who contained the violence in key hot spot areas and spread of such attacks in other areas. An Inter-Ministerial Committee (IMC), led by the Minister of Police, was set up to address xenophobic attacks. After, the outbreak of these xenophobic attacks, 597 xenophobia-related cases were recorded and about 1,700 persons were arrested. In July 2009, statistics indicated significant progress with 197 cases withdrawn by the National Prosecuting Authority, and 131 cases finalized with 82 guilty verdicts and 49 not guilty verdicts recorded. The momentum of the fight against xenophobia since 2008 was maintained and witnessed during the 2010 World Cup hosted by South Africa. Strict monitoring of proliferation of businesses owned by foreign nationals is maintained, including regulation and protection of such businesses.

148. In August 2008 a workshop on refugee protection was conducted in Alexandra. The objective of this workshop was to foster tolerance through an understanding of international legal obligations on protection of refugees. Again in August 2008 a National Social Dialogue consisting of government departments and civil society was convened. The aim of this gathering was to engage public dialogue on identifying strategies for promoting social cohesion. At the end of this dialogue, a declaration was adopted committing various role players for shared responsibility on the elimination of xenophobia through public education; educating immigrants about their rights and responsibilities; strengthening stakeholder partnerships in migration management and combating all manifestations of xenophobia. In 2010 the South African Human Rights Commission released a report on its investigation into 2008 xenophobic attacks. It was well received by the Government and the public at large.

149. In the main, the Government's response to xenophobic violence revolves around the proactive facilitation of societal dialogue. This has been taking place at various areas in the country and involves the police, churches, community policing forums and non-governmental organizations. Communities are advised to alert authorities in the event of xenophobic attacks. The Government and its agencies are committed to a swift and decisive response towards anyone found to be inciting violent acts against foreign nationals. As required by the Declaration and Programme of Action of the WCAR, South Africa has developed a Plan of Action to address racism and xenophobia. A policy to fight hate crime, racism, racial discrimination, xenophobia and related intolerance has been developed. This will be translated into legislation criminalizing these acts. Government has programmes on social cohesion aimed at creating one South African society that is united in diversity and includes foreign nationals. In 2011 a summit on social cohesion was held at Walter Sisulu Square (Kliptown).

E. Freedom to leave South Africa

150. Section 21(b) of the Constitution guarantees everyone's right to leave South Africa. Recognizing that the exercise of this right is tied with the right to obtain necessary travel documents, section 21(d) of the Constitution and section 3 of the South African Passport

and **Travel Documents Act, 1994 (Act No. 4 of 1994)**, accord every South African citizen the right to a passport.

F. The right to enter one's own country

151. The Constitution at section 21(c) stipulates that every citizen has the right to enter South Africa. The Office of the United Nations High Commissioner for Refugees opened office in South Africa in 1991 to deal with the repatriation of exiles that fled during apartheid. Some 12,000 people were assisted in returning home.

Article 13 – Rights of foreigners

152. The admission and removal of foreigners was previously regulated by the **Aliens Control Act, 1963 (Act No. 30 of 1963)**. This was repealed and replaced with the **Immigration Act**, which has also subsequently been amended by the **Immigration Amendment Acts of 2004, 2007 and 2011**. The new immigration policy is being implemented under the umbrella of the International Bill of Rights and the Constitution. Where people are detained under the current immigration law, the detention and arrests are all conducted in line with article 9 of the Covenant and the Constitution. This is most clearly manifested in section 34 of the Immigration Act, which does not condone the prolonged detention of illegal foreigners for periods of more than 30 days without a warrant of a court, in terms of section 34(1)(d). This detention may be extended on good and reasonable grounds by warrant of court for a period not exceeding 90 calendar days. Deportations are also conducted through legal procedures set out in the Act with adequate provision for the person involved to participate and challenge the processes.

153. In terms of section 10 of the **Immigration Act**, a foreigner must be in possession of a temporary residence permit or extension of one if he/she wants to be in the Republic of South Africa temporarily. If such a foreigner wants to remain permanently, an immigration permit is required. Being in the Republic in contravention of these requirements or after the required permit has expired renders a person illegal and a prohibited person who is to be removed or deported. At all times when this is suspected by the authorities, the person is given the right to be heard and can bring, and in fact is required to bring, such evidence as would prove his/her legality. Failure renders him/her liable to removal. When illegal foreigners are found, they are arrested and detained pending their removal. In such cases personnel of their missions or embassies are informed of the arrest and detention, and their cooperation sought to obtain travel documents for the removal of such persons.

A. Rights and obligations of refugees and asylum seekers

154. The Government is committed to securing for refugees in South Africa the legal protection that international law provides them. In particular, the Government recognizes the duty to recognize the principle of non-refoulement, which requires that refugees may not be returned, directly or indirectly, to countries where they risk persecution or danger on their lives. Refugees will not be prosecuted on account of their illegal entry into or presence in South Africa, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence; refugees will not be expelled from South Africa except on grounds of national security or public order; refugees will be afforded basic security rights, protection from abuse of state power, such as wrongful arrest and detention and protection against physical attack; refugees will be afforded basic human dignity rights such as protection against discrimination, the right to family unity, freedom

of movement and association and freedom of religion; and refugees will be afforded self-sufficiency rights such as the right to work and to education.

155. Refugees also bear obligations while in South Africa; the main one being to respect the laws of the Republic, and any refugee who breaks the law is dealt with in terms of the criminal or civil procedure Acts as if he/she were a citizen of South Africa. However, a refugee cannot be deported as punishment for criminal conduct.

Articles 14, paragraph 1; and 26 – Equality before the law

156. Section 9(1) of the Constitution states that everyone is equal before the law and has the right to the equal protection and benefit of the law reinforced by section 34 of the Constitution which stipulates that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum. This guarantee is available for all within the Republic including refugees, asylum seekers and all foreigners lawfully within the Republic.

157. Access to justice, and consequently enforcement of human rights, however, remains a challenge for many black people, partly because of the complexity of the legal system. Measures are, however, under way to bridge the gap between people's life experiences and the legal system. Many interventions in this regard are articulated in Justice Vision 2000, a strategy released in 1997 by the Government, with the aim of setting out the vision and parameters for the transformation of the justice system. Measures include the development of a cost -effective and equitable framework for state legal aid, increased access to lawyers, and the introduction of plain legal language in statutes and court proceedings. This followed and was aligned with the NCPS, which looked at the transformation of the criminal justice system from a cross-sectoral perspective.

158. Another impediment to access to justice is the prohibitive costs of litigation. The courts have started to recognize the impact of legal costs on access to justice by refusing to make costs orders against losing applicants in what is described as "public interest" litigation. Also, considerable progress has been made in the area of labour law with the establishment of the Commission for Conciliation, Mediation and Arbitration, which affords thousands of people access to a forum, without any charge, for the resolution of labour disputes. An important avenue that has been identified for realizing access to justice for poor people in the rural areas especially is the establishment in law of traditional courts through the **Traditional Courts Bill B1-2012**, which is in the process of being adopted, has been sent back to provinces for further consultation.

159. Mention must also be made of the Small Claims Court, established by the **Small Claims Courts Act, 1984 (Act No. 61 of 1984)**. These courts are aimed at enabling and assisting the disenfranchised communities to resolve civil cases of claims valued at R7 000 or below; the amount is determined and can be reviewed by Minister as published in the Gazette. This allows cases to be resolved in a speedy, simplified and inexpensive manner. There are now a total of 168 Small Claims Courts throughout the Republic. There are numerous challenges facing these courts relating to human and physical infrastructure. In 2008, the Department of Justice and Constitutional Development responded to these challenges by developing a National Action Plan to re-engineer Small Claims Courts. As part of the re-engineering process, a Project Office was established to address issues relating to training of commissioners and court officials as well as ensuring that Small Claims Courts systems are accessible, inexpensive and understandable by all.

160. To assist the indigent to access the courts, the **Legal Aid Act, 1969 (Act No. 22 of 1969)**, which had primarily been applied to whites, was amended and is now applicable to

everyone through the **Legal Aid Amendment Act, 1996 (Act No. 20 of 1996)**. However, due to resource constraints, not all those who need or require legal aid are able to access it. Despite the increased volume of mattes handled by the Legal Aid Board (LAB), representation for civil matters still lags behind. In addition, there are a growing number of applicants for legal aid who fail the means test but who, although gainfully employed, are still unable to afford their own legal representation. Currently the LAB operates through three delivery mechanisms. First, through the Justice Centres, where it employs fulltime legal practitioners; second, through the judicare system in terms of which private practitioners are briefed to do legal aid work at fixed rates according to a table of tariffs; third, through cooperation partners whereby certain NGOs and law clinics are funded by the LAB to deliver specialist services or services in geographical areas not covered by the LAB. The LAB has assisted thousands of people to access justice with a total of over 422,822 legal matters finalized for the year 2009/2010, and over 400,000 new criminal and civil matters brought to court. Legal Aid South Africa has extended its services to 66 justice centres, 64 satellite centres and 13 High Court units. The approach to use Alternative Dispute Resolution Mechanisms in South Africa is an essential element of access to justice as it provides speedier, less cumbersome and cost-effective mechanism for dispute resolution (the mechanisms are founded on restorative justice principles).

161. It is increasingly difficult for the LAB to fulfil all the legal representation needs of those members of society who are unable to themselves do so. In view of this difficulty, the LAB is currently reviewing the whole system to make it more efficient and cost-effective. It is also seeking avenues of cooperation with other stakeholders in the justice sector with a view of finding ways to satisfy the need for legal representation, particularly for civil matters. Some courts have created legal aid units through the establishment of information desks, which offer legal information, advice and referral to appropriate agencies. Personnel who have knowledge of the law and human rights occupy these desks and they receive complaints on poor treatment received in courts. Some courts have also set up a "witness friend" who assists witnesses with issues such as ushering them to the correct courts. They also attend to some of the concerns of witnesses and provide support.

Article 14 – Right to fair trial

A. Fair and public hearing by a competent, independent and impartial tribunal

162. Persons against whom criminal charges have been laid are afforded the right to a fair hearing in terms of section 35 of the Constitution. In particular, section 35(3)(c), which includes the right to a public trial before an ordinary court, requires further that a trial be both procedurally and substantively fair. The **South African Judicial Education Institute Act, 2008 (Act No. 14 of 2008)**, establishes an education institute for the judiciary so as ensure that the judiciary is properly skilled to implement this right. The court system in South Africa is designed to ensure its independence and impartiality. Litigants are entitled to challenge the competence, independence and impartiality of a court or tribunal as provided for under the **Judicial Service Commission Amendment Act,2008 (Act No. 20 of 2008)**, which provides for the mechanism of receiving and dealing with complaints about judges.

163. In the higher courts, judicial officers are appointed openly by the President on the advice of an inclusive and independent Judicial Services Commission, a creature of the Constitution. Its composition is broadly representative of South African society. As at the end of 2013, of the 243 judges countrywide, (89) were white, 108 were African, 23 were coloured and 23 were Indian. Overall, 77 were female and 166 male. As to the lower courts,

of the 1,666 magistrates, 43 per cent were white, 41 per cent African, 8 per cent coloured and 9 per cent Indian. Overall, 38 per cent were female and 62 per cent male. Although there is progress in transforming the judiciary, it remains male dominated. On 5 May 2010, the first woman Judge President was appointed.Judicial officers in the lower courts are appointed by the Minister of Justice and Constitutional Development on the advice of a Magistrates' Commission, created by statute.

B. Presumption of innocence

164. Section 35(3)(h) of the Constitution guarantees the right of all accused persons to be presumed innocent, to remain silent, and not to testify during the proceedings. Jurisprudence shows that the courts in South Africa use presumption of innocence to describe two different phenomena: a rule regulating the standard of proof, and a policy directive that the subject of a criminal investigation must be treated as innocent at all stages of the criminal process irrespective of the probable outcome of the trial.

C. Rights of persons charged with a criminal offence

165. The rights of accused persons are dealt with in section 35 of the Constitution. In this regard, an accused person is entitled to the right to fair trial, which includes the right to be informed of the charges with sufficient detail to answer them and to have their trial begin and conclude without unreasonable delay. In **Du Preez v Attorney-General of the Eastern Cape1997 (3) BCLR 329 (E)** the Court acknowledged that a person charged with a criminal offence has the right to insist that he/she or she should be tried within a reasonable time after being charged; to be present when being tried; to choose, and be represented by a legal practitioner, and to be informed of this promptly.

166. An additional violation of human rights occurs because of the length of time that awaiting-trial detainees often have to wait in prison before appearing before a court of law to face charges. In a briefing to the Portfolio Committee on Correctional Services, the JCPS cluster pointed out that as of 12 October 2010 there were a total of 46,432 persons being held in detention while awaiting trial. Of this number 2,080 had been in prison for more than two years with the vast majority of these (1,516) having been detained for more than three years. Worryingly, since 2009 there has been a gradual increase in the number of people awaiting trial for more than two years in South African prisons. Many awaiting-trial detainees have also been granted bail and could be living at home but because they are too poor to afford the bail amount, remain behind bars.

167. The right to remain silent and the right to be informed pertain only to a situation where the subject is confined and under the control of the state. Persons who make statements while not under any physical restraints or any form of state compulsion must bear the consequences if they voluntarily incriminate themselves. In **S v Gouws1995 (8) BCLR 968 (B)** it was held that failure to inform the accused of his right to legal representation amounted to a breach of the accused person's right to a fair trial and to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language.

168. The right to be released on bail and the presumption of innocence are parallel rights in that bail is granted to avoid punishing the accused before conviction. However, the overriding consideration in bail applications is the interests of justice. The purpose of imposing bail is to ensure the defendant's appearance at trial and not to punish the defendant. According to the **Criminal Procedure Act**, bail can also be refused if there is reason to believe that the accused will disturb public order or undermine peace or security.

The Act also sets out a schedule of offences for which a court is empowered to refuse bail unless the accused satisfies the Court that exceptional circumstances exist to justify his/her release. These offences include rape, slaying of a police officer, the killing of a person during rape, robbery with violence, and murder in which a firearm was used.

169. The press and the public may be excluded from all or part of a trial for reasons that are considered strictly necessary in the opinion of the Court where publicity would prejudice the interests of justice. Any judgment rendered in a criminal case of civil action shall be made public except where the interests of juveniles must be protected and where the proceedings concern matrimonial disputes of the guardianship of children.

D. Review by higher tribunal

170. An accused has the constitutional right to appeal or review. In **S v Ntuli1996 (1) SA 1207 (CC)** the Constitutional Court was called on to decide on the constitutionality of sections of the Criminal Procedure Act, which barred imprisoned convicts from personally prosecuting their appeals without first obtaining a judge's certificate. The statute made no provision for an oral hearing or a consideration of the trial record. The Court held that this process was "unsystematic" and worked in a "haphazard way" since some judges called for the record while others did not. In these circumstances, there was a likelihood that worthy appeals would be stifled because they did not attract sufficient judicial attention.

171. In **S v Steyn2001(1) SA 1146 (CC)** it was argued that an appeal from a Magistrates' Court was less favourable to a person wishing to appeal than from a High Court due to the different appeal procedures. This was held to infringe the right to appeal proceedings, as enshrined in section 35(3)(o) of the Constitution, and that this infringement did not amount to a justifiable limitation and therefore the sections of the Criminal Procedure Act setting out the appeal procedures were held to be invalid.

172. To further guarantee the fair trial of an accused person, section 35(5) of the Constitution states that evidence must be excluded if it was obtained in a manner that violates any right, if the admission of the evidence will render the trial unfair and if the evidence will be detrimental to the administration of justice. See **S v Mathebula and Another1997 (1) BCLR 123 (W)**, where the state sought to tender evidence of an accused person who had not been informed of his constitutional right to legal representation or his right not to be compelled to make a confession that could be used in evidence against him. The Court held that evidence obtained by means that ignore an accused person's constitutional rights is inadmissible unless the breach of such rights is justified by the provision of the limitation clause in the Constitution.

E. Rights of juvenile offenders

173. The Government is committed to ensuring that in all matters concerning children the principle of the best interests of the child is upheld. For a long while there was no specific legislative enactment dealing with children in conflict with the law. The Government has now adopted a policy of restorative justice in relation to child offenders. Existing legislation is therefore being innovatively employed to ensure that children are subjected to a system of criminal justice that takes into account their age and vulnerability. The emphasis is on the diversion of children from the criminal justice system to probation and child-friendly programmes such as life skills and anger management programmes. section 6 of the **Criminal Procedure Act**, which allows the prosecuting authority the power to withdraw a charge or stop prosecution, provides the legal framework for diversion. The number of children being diverted from the criminal justice system has been increasing in

the last few years, with 19066 children diverted in 2007/08. From April 2009 to March 2010, 16,173 children were diverted from the criminal justice system out of a total of 32288.

174. To improve service delivery in juvenile cases, approximately 250 regional court magistrates have been trained on child justice diversion and non-custodial sanctions. Administration support staff, prosecutors and magistrates are continually being trained on juvenile justice. In addition, to ensure legal representation of all children charged with crimes, the LAB has established a Children's Unit to represent children in conflict with the law. The Board assisted 59,266 children during the 2009/2010 financial year for both civil and criminal matters.

175. Despite the progress made so far, there are still gaps in ensuring an efficient juvenile justice system. In recognition of these gaps, the Government prepared and adopted the **Child Justice Act**, which is meant to ensure the human rights of all children in conflict with the law, and that they are treated in a manner that is sensitive to their needs. In tandem with the **Child Justice Act**, several initiatives have also been taken in line with and in the spirit of the **Child Justice Act**. In particular, the ISCCJ developed the Interim National Protocol on the Management of Children Awaiting Trial. The Protocol provided guidance about how children accused of crimes were to be dealt with in the interim period before the Child Justice Act was enacted.

176. The **Child Justice Act** envisages the creation of One-Stop Child Justice Centres. The Department of Justice and Constitutional Department has already established two such centres, in Port Elizabeth and Mangaung, where various role players operate under one roof and provide integrated services specifically designed for children in conflict with the law. The new system also places a great deal of emphasis on the first 48 hours after the child is apprehended. A number of alternatives to arrest are provided (such as taking a child home and giving a written notice to appear at a subsequent proceeding) and the police officer is enjoined to use one of the alternatives to arrest in all petty offences unless particular reasons exist for not doing so. Where arrest is used it is to be done in a manner that promotes the dignity and wellbeing of the child.

177. Due to the history of policing in South Africa, as well as a current lack of trained personnel, it is proposed not to include a provision for a specialized unit within the police force to deal with arrested children. Instead, the system aims to get the children out of police hands as soon as possible, either into the care of their parents or to a probation officer who will undertake an assessment of the child. The primary purposes of the assessment are to establish the prospects of diversion of the case, and to formulate recommendations regarding release of the child into the care of his/her family or placement of the child into an appropriate residential facility. Diversion is a central feature of the new system, and the **Child Justice Act** sets out a range of diversion options, listed in three levels depending on the intensiveness of the programme.

178. Under the new system those children who are not diverted (either because they indicate that they intend to plead not guilty to the charge or because the particular circumstances surrounding the child or the case make diversion inappropriate) will proceed to plea and trial in the Child Justice Court. In urban areas, where there are sufficient cases to warrant it, fulltime Child Justice Courts with specially selected and trained personnel will be set aside. In rural areas, the Court will simply "constitute" itself as a Child Justice Court, following the procedures set out in the legislation. The aim is that the majority of children will be tried in the Child Justice Court (which will operate at district level). However, cases involving murder and rape, or other exceptional circumstances may be referred to the Regional Court or even the High Court. However, it must be stressed that even when this occurs the child is not to be tried as an adult.

179. The Act includes a wide range of sentencing options, including non-residential or community-based sentences, sentencing involving restorative justice concepts such as restitution and compensation to the victim, and finally, sentences involving a residential element. The Act makes it clear that imprisonment should only be used as a measure of last resort and then for the shortest possible period. The use of imprisonment is further limited by age and a list of offences for which children may be imprisoned. Legal representation will be provided for at state expense where a child is deprived of his/her liberty or where the alleged offence is such that he/she is likely to get a sentence involving loss of liberty. Expunging records is provided for in a unique system whereby the magistrate in the Child Justice Court or other court hearing the matter must, at the time of determining the sentence, also make a decision whether or not the criminal record should be expunged, and if he/she or she so decides, to set the date on which the record will fall away, and the date should not be less than three months and not more than five years from the date on which sentence is passed. Certain very serious offences are, however, excluded from this possibility. Finally, the Act provides for a monitoring structure to oversee the efficient running of the new system, an integrated Information Management System facilitated by the ICCJ.

F. Ne bis in idem

180. Section 35(3)(m) of the Constitution embodies the principle of *ne bis in idem*. This section states that an accused person shall not be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted. This constitutional guarantee finds practical application in section 106(1)(c) and (d) of the Criminal Procedure Act, which makes provision for an accused to plead that he/she has already been convicted of the offence for which he/she is charged or that he/she has already been acquitted of the offence with which he/she is charged.

Article 15 – Principle of legality

181. The Constitution in section 35(3)(l) provides that an accused has the right not to be tried for an act that was not an offence under national and international law when it was committed. This provision makes the common-law principle of *nullumcrimen sine lege*, which forms part of the principle of legality in criminal law, a constitutional imperative. Thus in **Ex Parte Minister of Safety and Security: in re S v Walters 2002 (4) SA 613 (CC)**, an order invalidating section 49(2) of the Criminal Procedure Act applied prospectively only. section 49(2) authorized the use of deadly force in effecting arrest. section 35(3)(l) of the Constitution recognizes that national laws may "retrospectively" punish acts which were international crimes – but not national crimes – when they were committed.

182. Pursuant to section 35(3)(n) of the Constitution, an accused person is entitled to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and time of sentencing. Thus in **Veldman v DPP 2007 (9) BCLR 929 SCA**, the Supreme Court of Appeal found that where the prescribed minimum sentence has changed between the date of the commission of the offence and the date of the coming into operation of new prescribed punishment, basic fairness and justice require that the accused be sentenced in accordance with the less severe of the two punishments.

Article 16 – Right to recognition as a person before the law

183. In South Africa, everyone has the right to be recognized everywhere as a person before the law in terms of section **28(1) of the Constitution**. Legal personality is acquired at birth, at which point an individual becomes a subject before the law. Every person, irrespective of his/her age, mental condition, race, sex, intelligence or ability is recognized as a legal subject. As the discussion in this report has revealed, one of the themes underlying the entire Bill of Rights in the South African Constitution is to secure the equal recognition of everyone before the law. In this connection reference must be had to the numerous measures that this report has highlighted which ensure that all South Africans enjoy equality of recognition as persons before the law.

Article 17 – Right to privacy

184. The general right to privacy and protection against specific infringements of the right to privacy is guaranteed under section 14oftheConstitution of the Republic of South Africa. This section provides that everyone has the right to privacy, which includes the right not to have their person or home searched, their property searched, their possessions seized or the privacy of their communications infringed.

185. Section 14 of the Constitution embodies both a general right to privacy as well as certain specific rights, but extends only as far as those aspects of a person's life in which a legitimate expectation of privacy can be assumed. The Constitution, therefore, recognizes that in most cases when someone's person, home or property is searched, or when someone's possessions are seized or communications intercepted, the general right to privacy is infringed –**Director of Public Prosecutions: Cape of Good Hope v Bathgate 2000 (2) SA 535 (c)**. For purposes of protecting the right to privacy, the meaning of the words "home" and "family" in the South African context stipulates that a family is a collective body of persons living together under one head and that the home is the place of abode of the family.

186. As interpreted by the Constitutional Court in **Bernstein and Others v Bester NO and Others1996(4) BCLR 449 (CC)**, it is not absolute; it is only the inner sanctorum of a person such as his or her family life, sexual preference and home environment that is shielded from erosion by conflicting rights of the community. The right to privacy is acknowledged in this truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly and extends only to those aspects to which a legitimate expectation of privacy can be harboured.

187. There are several pieces of legislation that govern authorized interference with the right to privacy. Such interferences must not only conform to the requirements of the enabling legislation but also be in line with section 36 of the Constitution, which provides for conditions under which rights may be limited. The police are, for instance, empowered to conduct searches and seizures under the **Criminal Procedure Act**, but must obtain a search warrant. Similarly, under section 29 of the **National Prosecuting Authority Act, 1998 (Act No. 32 of 1998)**, the Investigating Director or any person authorized by him or her may conduct searches and seizures in accordance with the conditions stipulated. In this regard, searches and seizure may only be conducted by virtue of a warrant issued in chambers by a magistrate. In addition, searches under section 29 must be conducted with strict regard to decency and order, including: a person's right to, respect for and the protection of his rights or her dignity; the right of a person to freedom and security; and the right of a person to his/her personal privacy.

188. South Africa recognizes its duty to guard against interferences of the right to privacy. Under the **Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 (Act No. 70 of 2002)** (RICA), the Government may intercept communication in the course of its transmission in line with the provisions of the Act. RICA requires that everyone who has a cell phone to register the SIM card. While the Act may seem draconian on the face of it, one ought to bear in mind the elaborate mechanisms that the Act puts in place to ensure that its provisions are not abused.

189. The judiciary has also been keen to protect the right to privacy. In **Christian Lawyers Association of SA and Others v Minister of Health and Others1998 (11) BCLR 1434 (T)** the High Court, faced with a question of invalidity of the **Choice on Termination of Pregnancy Act**, in so far as it was inconsistent with section 11 of the final Constitution providing for right to life, held that under the Constitution the foetus was not a legal persona. To afford the foetus the status of a legal persona would also impinge on rights accorded to women by the Constitution, including the right to human dignity and right to privacy.

190. It is important to note that under section 35(5) of the Constitution, evidence obtained in violation of a person's right against searches and seizures must be excluded in criminal matters. However, the Constitution does not contain any regulations regarding civil matters; their admissibility is left in the discretion of the Court, even if such evidence is obtained contrary to the right to privacy. The unfortunate result of this uncertainty is that, as was in stated in **Protea Technology Ltd and Another v Wainer and Others1997(9) BCLR 1225 (W)**, no reliance can be placed on the fact that evidence obtained in contravention to the right of privacy will be inadmissible.

Article 18 – Freedom of thought, conscience and religion

191. Section 15(1)of the Constitution guarantees everyone within the Republic the right to freedom of conscience, religion, thought, belief and opinion. Borrowing from the jurisprudence of Canadian courts, South Africa's Constitutional Court has held that the concept of freedom of religion entails the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. Individuals are thus permitted to exercise their religion or belief either individually or in concert with others. Indeed, section 31(1) of the Constitution states that persons belonging to a religious community may not be denied the right, with other members of that community to practice their religion, and to form, join and maintain religious associations. section 31 of the Constitution must be read with section 9 of the Constitution, which prohibits discrimination on the grounds of religion, conscience and belief.

192. Separate spheres for religion and the state are established by the Constitution but there is scope for interaction between the two. Thus section 15(2) of the Constitution stipulates that religious observances may be conducted at state or state-aided institutions provided that three conditions are satisfied: those observances follow rules made by the appropriate public authorities; they are conducted on an equitable basis; and attendance is free and voluntary. The term "religious observance" has been defined by the High Court to refer to an act with a religious character, a rite. The observance must be religious, in the sense of "human recognition of superhuman controlling power and especially of a personal God or gods entitled to obedience and worship" – **Wittmann v DeutscherSchulverein, Pretoria1998 (4) SA 423 (T) 440-6**.

193. An important facet of section 15(2) is the condition for equal treatment of all religions. The state neither advances nor inhibits religion; it merely assumes a position of fairness towards all religions and world views. While it is estimated that the majority of the population in South Africa is Christian, there are many other religions, some documented and some not. These include Hinduism, Islam, Judaism, and a variety of indigenous religions and belief systems.

194. In order to promote coexistence and tolerance among religions, numerous pieces of legislation prohibit discrimination on the basis of religion. Chief among these is the **Promotion of Equality and Prevention of Unfair Discrimination Act**. Under the **Independent Broadcasting Act,1993 (Act No. 153 of 1993)**, all broadcasting activities must be made in the public interest to ensure that in the provision of public broadcasting services the needs of language, cultural and religious groups are duly taken into account. Schedule 1: Code of Conduct for Broadcasting Services, provides in section 2 that broadcasting licensees shall not broadcast any material, which is indecent or obscene or offensive to public morals or offensive to the religious convictions or feelings of any section of the population. In the same vein, the **Films and Publications Act, 1996 (Act No. 65 of 1996)**, states in schedule 10 that a publication or a film which, judged within context, advocates hatred that is based on religion, and that constitutes incitement to cause harm, shall be classified as XX, but that it shall not apply to a bona fide scientific, documentary, dramatic, artistic, literary or religious publication or film, or any part of itwhich amounts to a bona fide discussion, argument or opinion or a matter pertaining to religion, belief or conscience.

195. In the political field, the **Electoral Act**, under which the Electoral Code of Conduct has been promulgated, stipulates that no registered party or candidate may discriminate on the grounds of religion. Under the **Publications Act, 1974 (Act No. 42 of 1974)**, a mechanism is provided for banning material as "undesirable" when it or any part of it is blasphemous or offensive to the religious convictions or feelings of a section of the population.

Article 19 – Freedom of opinion and expression

A. Right to hold opinions without interference

196. The right to hold opinions without interference in South Africa is enshrined under section 15 of the Constitution, which provides that "everyone has the right to freedom of conscience, religion, thought, belief and opinion". There are a number of statutes that have been enacted to ensure that individuals' right to hold opinion is not interfered with.

197. The **Electoral Act**, section 87(1)(a), prohibits interference with political opinion. The Electoral Code of Conduct promulgated under this Act requires that every registered party and every candidate must publicly state that everyone has the right to freely express their political beliefs and opinions, and challenge and debate the political beliefs and opinions of others. The **Employment Equity Act** prohibits unfair discrimination on the basis of political opinion.

198. Under the **Public Service Act, 1994 (Proclamation103 of 1994)**, while public servants may be members and serve on the management of a lawful political party and attend public political meetings, they may not preside or speak, draw up or publish any writing or deliver a public speech to promote or prejudice the interests of any political party. Similarly, under the **South African Police Service Act**, police officers may join political parties and attend their meetings but they are prohibited from publicly displaying or expressing support of a political party.

B. Freedom of expression

199. Section 16of the Constitution guarantees everyone's right to freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; academic freedom and freedom of scientific research. Recognizing that the exercise of this right carries with it some duties and responsibilities, there are several other constitutional and statutory provisions that define and restrict the scope of this right. As a general rule, any law that seeks to restrict freedom of expression must be in conformity with section 36 of the Constitution, and in particular, it must not make inroads which are so extensive as to render the right a nullity – **Islamic Unity Convention v Independent Broadcasting Authority and Others 2002 (5) BCLR 433 (CC).**

200. The Constitution has gone beyond the Universal Declaration on Human Rights, the Covenant and the International Convention on the Elimination of All Forms of Racial Discrimination by extending limitations on freedom of expression to include advocacy of hatred (hate speech) based on gender or religion. The international instruments, especially the Convention, place limitations on freedom of speech based on race or ethnicity. section 36 places limitations on rights in terms of law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account specified factors (non-exhaustible). In this regard, the **Promotion of Equality and Prevention of Unfair Discrimination Act** at section 10 declares that no person may publish, propagate, advocate or communicate words against any person that is intended to be hurtful, harmful or intended to promote or propagate hatred save for *bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with the Constitution. This Act provides for civil remedies. As required by the Convention, a policy on hate speech, racism, racial discrimination, xenophobia and related intolerance has been developed. This will be translated into legislation criminalizing these acts. Such legislation will complement the Promotion of Equality and Prevention of Discrimination Act.

201. On press freedom, the legal regime is set out in at least two acts of Parliament, the **Broadcasting Act, 1999 (Act No. 4 of 1999)**, and the **Independent Communications Authority Act, 2000(Act No. 13 of 2000) (ICASA Act)**. The Broadcasting Act seeks to encourage ownership and control of broadcasting services through participation by persons from historically disadvantaged groups. It also wants to ensure plurality of news, views and information. The **ICASA Act** establishes the Independent Communications Authority of South Africa (ICASA), which regulates broadcasting in the public interest to ensure fairness and a diversity of views broadly representing South African society, as required by section 192 of the Constitution.

202. While freedom of the press is well entrenched in the Constitution, the press is enjoined to exercise this freedom cautiously and with due respect for the rights of others. This does not mean that unreasonable restraint should be placed on the press as to what it might publish but rather means that the press must take the necessary steps to ascertain legality of the sources of their information and the veracity of information that they publish – **NM and Others v Charlene Smith and Others (2007) 7 BCLR 751 (CC)**. Where there is a conflict between freedom of expression and another constitutional right (for example right to dignity and privacy), then the courts must reconcile the conflict by recognizing a limitation upon the exercise of one right to the extent that it is necessary to do so in order to accommodate the exercise of the other right according to what is required by the particular circumstances and within the constraints imposed by section 36 of the Constitution. Thus in **Tshabalala-Msimang and Another v Makhanya and Others 2008 (3) BCLR 338 (W)** the Court held that private and confidential information relating to a public figure could be

published even though such information was unlawfully obtained and notwithstanding that such publication *prima facie* violated the right to privacy and dignity of the public figure.

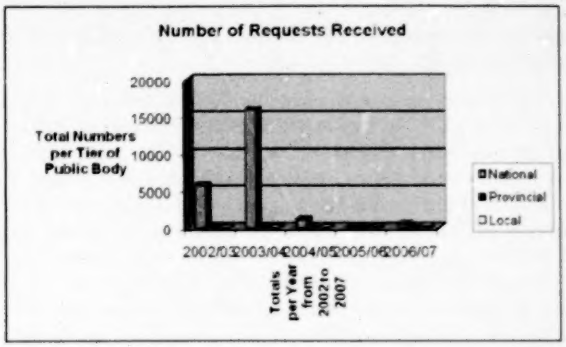
203. Consistent with the Covenant, freedom of the media may be restricted in certain circumstances. Thus in the case of **South African Broadcasting Corporation Limited (SABC) v the National Director of Public Prosecutions and Others(2008) ZACC 6**, the Constitutional Court held that live coverage of court proceedings in the Supreme Court of Appeal can be held but this is subject to the reasonable conditions that the Court may put on such broadcasts in the interests of justice. Similarly, in **Independent Newspapers (Pty) Ltd v Minister for Intelligence Services and Others CCT 38/ 07 (2008) ZACC 6**, the Constitutional Court held that reasonable limitations can be made on open justice. As such, certain parts of evidence presented in camera could not be released to the public through the media as they concerned public security.

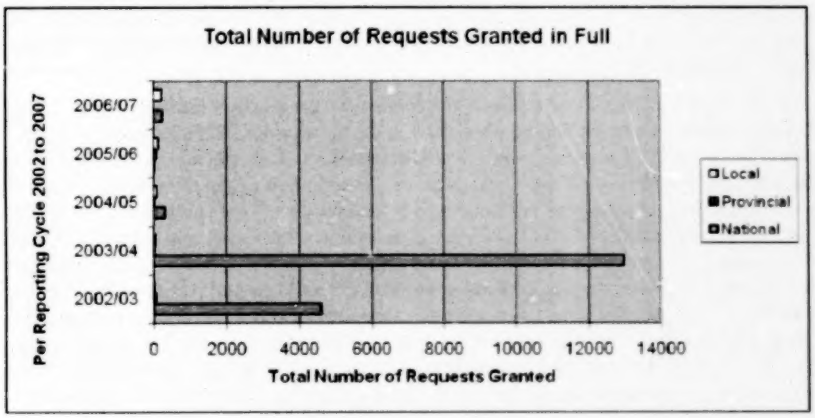
204. The Office of the Press Ombudsman and Appeal Panel have been set up by the South African newspaper and magazine industry to regulate itself and to promote the principles of freedom of speech, information and opinion. The Press Ombudsman protects the interests of the general public and acts as an arbitrator should there be a conflict of interest between members of the public and the press. A decision made by the Press Ombudsman is binding.

C. Right of access to information

205. To the extent that freedom of expression is closely linked to right of access to information, section 32 of the Constitution is relevant and provides that everyone has the right of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights. However, article 19, paragraph 3, of the Covenant places limitations to freedom of expression (access to information) for the protection of national security, if provided by law and necessary. In applying the right of access to information and the Covenant, the Court would have regard to international law and its application in terms of sections 231, 232 and 233 of the Constitution.

206. The **Promotion of Access to Information Act, 2000 (Act No. 2 of 2000)** (the **PAIA**), was enacted to give effect to the above constitutional requirement. Among the objects of the Act are: the promotion of transparency and accountability in public and private institutions; the protection of certain security-related information held by public bodies, and the protection of privileged confidential professional information. The PAIA sets out precise regulations as to how requests for access to information must be dealt with. A manual for all staff members working on requests for access to information has been developed to ensure that requests are processed in line with the ideals of the Act as well as the Constitution. The PAIA also sets up a detailed mechanism for the resolution of all disputes relating to requests for access to information. Under the PAIA the internal dispute resolution mechanisms must first be exhausted before one can take a matter to court. Staff dealing with requests for access to information have attended training by the South African Human Rights Commission on the implementation of and compliance with the PAIA. The graphs below show the number of requests received and granted in full.





207. The right to access to information held by the Government is fostered by the South African Government Communication and Information System (GCIS), which is mandated to ensure the information needs of the public are met. GCIS convenes the Government Communicators Forum to ensure effective coordination of government communication. The National Action Plan (NAP) for the Promotion and Protection of Human Rights mandates GCIS to establish a Media Development Agency to enhance media diversity. The NAP further notes that, "the main responsibility of GCIS is to keep the public informed about issues that affect their daily lives". GCIS also provides information on human rights and how to access them.

208. The Media Development and Diversity Agency (MDDA) was established in terms of the **Media Development and Diversity Agency Act, 2002 (Act No. 14 of 2002)**, to help in the creation of an enabling environment for media development and diversity that is conducive to public discourse and reflects the needs and aspirations of all South Africans. The objects of the Act, in line with the national policy priorities and the Constitution, are to promote media development and diversity, media freedom, the right to freedom of expression and freedom to receive or impart ideas or information. Under the Act, the duties of the MDDA are to redress exclusions and marginalization of disadvantaged communities and persons from access to the media and media industry and to encourage the ownership and control of media by historically disadvantaged communities. The MDDA also conducts research into media development and diversity and has produced several reports that assist academics, practitioners and policy makers in understanding the media industry in South Africa. Since its formation the MDDA has achieved major milestones including, by

October 2011, the awarding of grants to the amount of R183.6m to over 407 projects, over 1,300 people trained, the provision of 243 bursaries to different radio and print media and the receipt of unqualified audits since its establishment.

209. A significant legislative development during the period under review was the introduction into Parliament of the **Protection of State Information Bill** in August 2009. The Bill seeks to establish a framework for the protection of personal information processed by public and private bodies to ensure that it is done in a manner that gives effect to the right to privacy subject to justifiable limitations that are aimed at protecting other rights and important interests. Due to some controversy about aspects of this Bill, the National Council of Provinces engaged in a wide-ranging public consultative process after the Bill was passed by the National Assembly. The Bill expounds eight principles that should guide the protection of information: processing limitation; purpose specification; further processing limitation; information quality; openness; security safeguards; good governance and date subject participation. As is traditional in South Africa's legislative process, comments from stakeholders and the public in general are currently been sought before the legislation is concluded.

210. Since PAIA became operational, the courts have emphasized that the right of access to information can only be limited when there is justification for such a limitation vis-à-vis other fundamental rights considerations. In **Mittalsteel SA (Ltd) (formerly ISCOR Ltd) v Hlatshwayo 2007 (1) SA 66** the focus was on the definition of a public body. A student requested access to minutes of meetings held by an entity before it had become private. In ordering that the student be allowed access to the minutes, the Court noted that PAIA must be examined in light of the advancements in trade and commerce that have permitted the privatization of public services. In **Unitas Hospital v Van Wyk and Another 2006 (4) SA 436 (SCA)** a request for access to a record generated by a private hospital was lodged by the widow of a patient who had died at the hospital. The lower court granted the request for access, but that decision was appealed in the Supreme Court of Appeal. The Court pronounced on the minimum a requester has to demonstrate in order to gain access to the records of private entities, and on the use of PAIA in the course of legal proceedings.

211. In order to promote access to information, the Government has been keen to ensure that core documents like the Constitution are translated into the local languages. In addition, a number of TV programmes and news bulletins broadcast by the public broadcaster, the SABC, are in local languages. Furthermore, various community radio stations such as Khaya FM, Thobela FM, Radio Turfloop and MunghanaLonene FM inform listeners of various civil and political rights via education and upliftment programmes. The challenge remains that those who prefer using English as the medium of communication largely control the South African print media. There are, however, some newspapers that are published in local languages, for example Illanga, Isolezwe, Ithubalethu, EzakwaZulu, Iqhawe News and Phumelela Express.

Article 20 – Prohibition of hate propaganda

212. While freedom of expression is guaranteed in South Africa as discussed above, this guarantee does not extend to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. As such, section 16(2) of the Constitution expressly states that freedom of expression does not include propaganda for war, incitement of imminent violence, or advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm.

213. Section 10 of the **Promotion of Equality and Prevention of Unfair Discrimination Act** brings gives effectto section 16(2) of the Constitution by prohibiting

any publication, propagation, advocacy or communication that is intended to be hurtful, harmful or incite harm or intended to promote or propagate hatred. The Act further states that without prejudice to any remedies of a civil nature under the Act, a court may, where appropriate, refer any case dealing with the above to the National Director of Public Prosecutions for the institution of criminal proceedings in terms of the common law or relevant legislation.

214. In similar tone, the **Regulation of Gatherings Act,1993(Act No. 205 of 1993)**, prohibits a person presenting at or participating in a gathering or demonstration from inciting hatred on account of differences in culture, race, sex, language or religion by way of speech, singing, banner, and placard or in any other manner. Further, no such person is allowed to perform any act or utter any words that are calculated or likely to cause or encourage violence against any person or group of persons. Any person who contravenes or fails to comply with this provision may be guilty of an offence and on conviction is liable to a fine not exceeding R20 000 or imprisonment for a period not exceeding one year, or both.

215. Section 29 of the **Films and Publications Act** stipulates that any person who knowingly distributes a publication, knowingly broadcasts, exhibits in public or distributes a film, or knowingly presents an entertainment or play in public which, judged within context, amounts to propaganda for war or incitement to imminent violence or hatred shall be guilty of an offence. Any person found guilty of contravention may be sentenced to a fine or to imprisonment for a period not exceeding five years, or where the Court finds aggravating factors, both a fine and imprisonment. A prosecution may, however, only be instituted in the High Court under the written authority of the Director of Public Prosecutions.

Article 21 – Freedom of assembly

216. The right to peaceful assembly is protected by section 17 of the Constitution, which provides that everyone has the right, peacefully, and unarmed, to assemble, demonstrate, picket and present petitions. This right is connected to the right to freedom of expression as well as to the right to freedom of association. It is clear from the wording in the Constitution that the Bill of Rights recognizes the existence of a bundle of rights in the right to peaceful assembly. Thus political, industrial and other forms of peaceful assembly are constitutionally protected. The inherent limitation here is contained in the terms "peaceful" and "unarmed" – **Acting Superintendent-General of Education of KwaZulu-Natal v Ngubo and Others1996 (3) BCLR 369 (N)** and **South African National Defence Union v Minister of Defence and Another 1999(4) SA 469 (CC)**.

217. The **Regulation of Gatherings Act** provides the normative framework for the exercise of the right to assembly and seeks to regulate the holding of public gatherings and demonstrations. It proceeds from the understanding that whereas every person has the right to assemble, such right must be exercised peacefully and with due regard to the rights of others. It recognizes fundamental rights such as the right to freedom of assembly and expression (and to a lesser extent association) and reconciles these rights with the maintenance of public order. An essential element of this law is the creation of a so-called "safety triangle" – the appointment of a convener of a gathering, a responsible officer of the local authority and an authorized member of the South African Police Service (SAPS). These three parties are the main role players and form a "partnership" to manage a public assembly. A gathering may only be prohibited when credible information on oath is received by a responsible officer that there is a threat that the proposed gathering will result in serious disruption of vehicular or pedestrian traffic, injury to participants or other persons, or extensive damage to property, and that the police and traffic officers will not be able to contain this threat.

218. No person is allowed to compel or attempt to compel any person to join a demonstration or gathering, either before or during the event. Further, demonstrations and gatherings in vicinity of courts, buildings of parliament and Union Buildings are prohibited. Entrances to buildings and premises, particularly where hospitals, fire or ambulance stations or other emergency services are situated, may not be barred. The wearing of a disguise mask or any other apparel or item which obscures facial features and prevents identification, as well as the wearing of any form of apparel resembling the uniforms of the security forces, including the SAPS and SANDF, is also prohibited. Any law regarding the carrying of dangerous weapons has to be abided by participants. Media participation is permitted and encouraged because of its role relating to transparency and can be used to the advantage of the community.

219. The above provisions reflect South Africa's policy shift from crowd control to crowd management and is also reflected in the South African Police Service Policy on Crowd Management. The new law and policy promotes co-ownership and co-management of the event by the local authorities, organisers and the police. The role of the SAPS is to ensure a balance between individual rights and collective security. The SANDF may only be used in a supportive, preventative role and never in the physical frontline. No loss of life, property damage, or injuries to persons is to occur. All citizens must be satisfied with the conduct of the police, and feel safe and secure if present at a gathering. It aims to establish standardized SAPS procedures to manage crowds in such a way that it conforms to democratic values and accepted international standards, as well as to be firm, fair, impartial, predictable and tolerant, to act in a community -orientated way, to be accountable for every action and to effect crowd management in a manner concurrent with the SAPS values of acting at all times in a professional, acceptable and effective manner. There are still some cases of police brutality, especially with respect to recent service delivery protests. The Government takes cognisance and will continue to work to ensure that appropriate crowd control measures are maintained.

220. SAPS is trained and equipped to deal with maintenance of public order in an integrated way involving the utilization of all possible resources within the service optimally. Members of the Division Operational Response Service are specially trained and equipped to manage crowds and stabilize public collective violence and to effectively prevent violence during gatherings, marches, and so ensure public safety. The use of live ammunition during crowd management operations is expressly forbidden, unless lives are threatened. Since then the Independent Complaints Directorate (ICD), now the Independent Police Complaints Directorate, started operating on 1 April 1997;ithas received only a small number of cases pertaining to the violation of the right to assembly.

Article 22 – Freedom of association

221. Section 18 of the Constitution includes the right to form and join trade unions. section 23 of the Constitution, therefore, guarantees everyone's right to fair labour practices. In this regard, workers are entitled to form and join trade unions and to participate in the activities and programmes of trade unions. Trade unions and employers' organizations have the right to determine the administration of their associations, to organise, form and join federations.

222. The **Labour Relations Act** embodies elaborate provisions that give content to the constitutional guarantee of the freedom of association. In particular, it provides a framework within which employees and their trade union, employers and employer's organizations can collectively bargain and formulate industrial policy. The Act, however, does not apply to members of the National Defence Force, the National Intelligence Agency and the South African Secret Service. The Act prohibits the formation of racially

exclusive unions in light of a legacy of a union movement that retains historical characteristics of apartheid. For example, although there have been noticeable strides with regard to racial integration in the labour movement, most historically black unions remain predominantly so and the same applies to historically white unions. The trade union federations exhibit the same characteristics. The Federation of Democratic Unions of South Africa (FEDUSA) remains predominantly white while the Congress of South African Trade Unions (COSATU) and the National Council of Trade Unions remain predominantly black.

223. However, the unions and the federations have taken significant steps to integrate their membership across racial lines. The Government has also adopted various administrative measures to encourage equal enjoyment of rights relating to the right to join trade unions and to encourage racial integration. The National Development and Labour Council encourage racial cooperation within the different federations. The Department of Labour has also funded the establishment of DITSELA, a labour -support organization that is a collaborative venture between COSATU and FEDUSA. The European Union has funded the South African Labour Development Trust, a capacity-building initiative that brings the three federations together. The purpose of this Trust is to advance economic development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objectives of the Labour Relations Act.

224. In **South African National Defence Union v Minister of Defence and Another1999(4) SA 469 (CC),** section 126(B) of the **Defence Act, 1957 (Act No. 44 of 1957),** (since repealed and replaced by the **Defence Act, 2002**) which provided that a member of the Defence Force who is subject to the Military Discipline Code shall not strike or perform any act of public protest or conspire with or incite or encourage or command any other person to strike or to perform such act or participate in a strike or such act, was challenged on the basis that it contravened section 16 of the Constitution. The Court asserted that freedom of expression was at the heart of any democracy and was thus closely related to many other rights protected in chapter 2 of the Constitution, and protected not only the right to form and express opinions but also the right to collectively establish associations and groups of like-minded people to foster and propagate these opinions. The Court thus held that section 126(B) clearly infringed the freedom of expression of those members of the Defence Force who were bound by it and this infringement was not justified. Following this decision the Minister of Defence issued regulations to regulate labour relations in the SANDF, which constitute Chapter XX of the General Regulations of the South African National Defence Force. The regulations provide for the registration of unions that have a proven membership of 5000 SANDF members at the time of their application for registration.

Article 23 – Protection of the family

225. Except for the recognition of marital status as one of listed grounds on which unfair discrimination is prohibited, choice of spouse and family life do not feature expressly in the Bill of Rights in the South African Constitution. The right to marry is governed by the **Marriage Act, 1961 (Act No. 25 of 1961)**. In terms of section 26 of the Act, the marriage age for boys and girls is 18. However, for boys under the age of 18 and girls under the age of 15, written consent by the Minister of Home Affairs or a court must be obtained. Over and above the written permission, consent of parents or guardian of a minor should be obtained. Where no such parent or guardian exists or where such consent cannot be obtained for good reason, section 25 of the **Marriage Act** empowers the Commissioner of Child Welfare to grant such consent. As a general rule, anyone who has attained the age prescribed by the Marriage Act may choose a spouse and enter into a marriage.

226. The Courts have interpreted other clauses in the Bill of Rights, including equality, human dignity and sexual orientation, to give concrete recognition to the rights of marriage and choice of spouse. The most recent Constitutional Court decision in this regard involved the issue as to whether foreigners married to South African citizens ought to enjoy rights regarding the processing of residence permits above those enjoyed by other foreigners. The Court affirmed that foreigners who are married to South African citizens are entitled to such special rights – **Dawoodand Another, Shalabiand Another, Thomas and Another v Minister of Home Affairs and Another2000 (8) BCLR 837 (CC).**

227. Dissolution of marriages, civil and customary, is governed by the **Divorce Act, 1997 (Act No. 70 of 1979).** In terms of this Act, a party to a marriage may apply to court for a decree of divorce on the grounds of irretrievable breakdown of marriage. Other grounds include mental illness or the continuous unconsciousness of a party to the marriage. Before granting a decree of divorce, the Court must be satisfied that provision is made for the welfare of minors or dependent children. A court that grants a decree of divorce may also make an order with regard to maintenance, custody or guardianship, access to minor children of marriage and any other order which is deemed to be in the best interest of the child. Parties to a divorce may make a written agreement on the divisi :: of property and maintenance of either of the parties. In the absence of such an agreement, the Court may make such an order. This applies also to customary marriages.

228. The **Maintenance Act,1998 (Act No. 99 of 1998),**provides the framework for monitoring and implementing maintenance orders. It provides for the handling of complaints received from persons seeking maintenance, who have experienced difficulties with the tracing of maintenance defaulters and the enforcement of maintenance orders, as well as complaints from the respondents on the inability to comply with the maintenance orders and of abuse of the maintenance system. The Isondlo Project helped to alleviate the problem of tracing defaulters through the training of investigators; this project has delivered better maintenance services. This project has been replaced by the Kariunde Project, with the main focus on managing and processing maintenance cases with a view to delivering best service to customers.

229. The right to inherit is not expressly provided for in the Constitution. section 9 of the Constitution on equality and the right against unfair discrimination has been the basis of inheritance claims involving discrimination to this point. At the end of 2000 the Constitutional Court ruled that the different and unequal application of laws in this regard is unconstitutional – **Moseneke and Others v the Master of the High Court and Others2001(2) SA 18(CC).**

Article 24 – Rights of children

230. South Africa ratified the Convention on the Rights of the Child (CRC) on 16 June 1995 and has since committed itself to protecting and promoting the rights of children in the country. In all its decisions and actions relating to children, the Government has sought to ensure that the best interests of children are given paramount importance. In **M v S 2007 (12) BCLR 1312 (CC),** the Constitutional Court clarified that while the best interests of the child should always be paramount consideration in all matters concerning children, the principle should not be applied to obliterate other constitutional rights.

231. A child under South African law is understood to mean a person under the age of 18 years. section 28 of the Constitution enumerates elaborate rights that children are entitled to. These rights include: the right to a name and a nationality from birth; the right to family care or parental care, or to appropriate alternative care when removed from the family environment; the right to basic nutrition, shelter, basic health care services and

social services; and the right to be protected from maltreatment, neglect, abuse or degradation.

232. Several pieces of legislation are in place to ensure that the above-mentioned rights of children are realized. Under the South African **Citizenship Act, 1995 (Act No. 88 of1995)**, all children born within the territory of South Africa are automatically granted South African citizenship. **The Births and Deaths Registration Act, 1992 (Act No. 51 of 1992)**, requires that notice of birth of a child be given within 30 days after the birth to the Director-General of Home Affairs for the purpose of registration of the child's birth. A birth certificate or an acknowledgement of receipt of notice of birth in a prescribed form is issued upon registration.

233. The Government has also adopted several policies and made a number of commitments in its efforts to promote the rights of children. Within a year of the ratification of the CRC, for example, the Government in collaboration with civil society launched the National Programme of Action for Children: A Framework (NPA). Subsequently the provinces launched respective Provincial Programmes of Action for Children. Subsequently, the NPA Steering Committee (NPASC) was established as a key instrument for monitoring and improving NPA implementation and its commitment to the principle of First Call for Children. The NPA represents the culmination of all efforts towards promoting the wellbeing of children. It provides a framework for giving children political priority, making them visible, implementing and monitoring the impact of coordinated and effective action, while promoting children's rights to protection, development, survival and participation in society.

Article 25 – Participation in government

234. Section 19(2) of the Constitution provides that every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution. Subsection 3 entitles every adult citizen to vote in elections for any legislative body in terms of the Constitution, and to do so in secret, and to stand for public office and, if elected, to hold office.

235. Certain persons may not be registered to vote despite the fact that they are adults and within South Africa. These persons include those who have applied for registration fraudulently and persons declared to be of unsound mind by the Court. Prisoners are, however, allowed to vote as decided by the Constitutional Court in **August and Another v Electoral Commission and Others 1999(3) SA 1 (CC)** and **Minister for Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) 2005 (3) SA 280 (CC)**.

236. Until recently, South African citizens residing outside the country could not cast their votes. However, in **Richter v Minister of Home Affairs and Others(2009) ZAGPHC 21**, the Constitutional Court declared section 33(1)(e) of the Electoral Act unconstitutional to the extent that it prevented South African citizens who are absent from South Africa from voting in the national elections. The Court stated that the right to vote is infringed if a registered voter is willing to take reasonable steps to exercise his or her right to vote, but is nevertheless prevented from doing so by a statutory provision.

237. Elections in South Africa are regulated by two Acts, namely the **Electoral Act** and the **Electoral Commission Act, 1996 (Act No. 51 of 1996)**. The latter establishes the Independent Electoral Commission (IEC), which is an independent constitutional body and subject only to the Constitution. The independence of this body was affirmed in **New National Party of South Africa v Government of the Republic of South Africa1999 (3) SA 191 (CC)**. Elections and referenda in the country at all three tiers of government

(national, provincial and local) are entrusted to a manifestly independent and impartial IEC. The IEC oversees the free and fair participation of every registered voter in the election, either to vote or to stand for election.

238. The IEC has 302 offices located in local municipalities throughout the country in which voters may register. Each voter is registered for a specific district. These are established by the IEC taking into account the number and distribution of eligible voters, the availability of transport and any geographical features that may impede access. The segmentation of the voters' roll in this way permits it to be used for national, provincial and local elections, including ward elections for local government. The Electoral Commission Act also establishes an Electoral Court with the same status as the High Court, which is empowered to review any decision of the IEC relating to an electoral matter, and hear and determine all electoral petitions.

239. An important element in the promotion of local democracy is the encouragement of public participation in municipal governance. To this effect the **Local Government: Municipal Structures Act** provides for the establishment of ward committees created to assist the democratically elected representative of a ward to carry out his or her mandate. Ward committee members are members of the community representing various interests within the community and the ward. These committees may play a critical role in the establishment, implementation and review of a performance management system for municipalities generally, the monitoring and review of a particular municipality's performance, decisions about the provision of municipal services, and communication about the dissemination of information. The Act establishes the rules for ward committees. In section 72(3), the role of ward committees is set out: "to enhance participatory democracy in local government." section 74 provides that a ward committee may make recommendations on any matter affecting its ward. A ward committee also has the duties and powers as the council may delegate to it. By the end of December 2011, 64 per cent of the required total of 4 277 ward committees had been established. A concept document to refine and revise ward committees and community participation has been developed.

240. South Africa remains a developing country with a significant number of people who can neither read nor write. This creates an obstacle to the full understanding of the electoral process. The IEC and organs of civil society are addressing this issue through voter-education initiatives.

Article 27 – Rights of minorities

241. The Constitution in section 31 provides that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of the community to enjoy their culture, protect their religion and use their language; nor to form, join or maintain cultural, religious and linguistic associations and other organs of civil society.

242. To ensure cultural, religious and linguistic communities enjoy their rights in practice, the Constitution in section 185 provides for the formation of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. The Commission was established in 2002 following the adoption of the **Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act, 2002 (Act No. 19 of 2002)**. The Commission started to discharge its functions in 2003 with the appointment of its members. The Commission has general powers to monitor, investigate, research, educate, lobby, advise and report on any issue concerning the rights of cultural, religious and linguistic communities; to facilitate the resolution of conflicts or friction between cultural, religious and linguistic communities or

between any such community and an organ of state; to receive and deal with complaints and requests by a cultural, religious or linguistic community; and to convene an annual national consultative conference consisting of delegates from the various cultural, religious and linguistic communities in South Africa and governmental and non-governmental role players.

243. In furtherance of language rights, the Constitution recognizes 11 official languages: Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu. In recognition of the historically diminished use and status of the indigenous languages, the Constitution obligates the state to take practical and positive measures to elevate the status and advance the use of these languages. One of the practical and positive measures the state has taken in this regard is the creation of the Pan South African Language Board, which is mandated to create conducive conditions for the development and use of the official languages of South Africa, the Khoi and San languages and South African sign language. In discharging its duties, the Board has created 13 National Language Bodies (NLBs), one for each official language, one for the Khoi and San languages and one for South African Sign Language. The task of the NLBs is to assist the Board in realizing the language development goals. The **Culture Promotion Act, 1983 (Act No. 35 of 1983), (as amended by Act No. 59 of 1988)** seeks to protect cultures of different communities. Further, the Department of Arts and Culture is in the process of finalizing the National Language Policy for South Africa. This policy will be implemented through the **South African Languages Bill** whose objects include giving effect to the letter and spirit of section 6 of the Constitution, promoting the equitable use of the official languages of South Africa, and providing for a regulatory framework to facilitate the effective implementation of the constitutional obligations concerning multilingualism. The South African Languages Bill became the **Use of Official Languages Act, 2012 (Act 12 of 2012),** in October 2012. This Act has replaced the **National Language Policy Framework of 2004** and applies to national government only; provinces and local government structures have their own legislation. The objects of the Use of Official Languages Act are to:

(a) Regulate and monitor the use of official languages for government purposes by national government;

(b) Promote parity of esteem and equitable treatment of official languages of the Republic;

(c) Facilitate equitable access to services and information of national government; and

(d) Promote good language management by national government for efficient public service administration and to meet the needs of the public.

244. In addition, South Africa has implemented and funded practical steps and educational, economic and scientific programmes for the protection and promotion of indigenous peoples. Known as the Indigenous Knowledge System, this ambitious programme brings together indigenous communities, universities, research centres and economic partners and enjoys the support of the Government. This includes the establishment of the National Khoi-San Community, which will look at national, regional and international approaches and models for the constitutional accommodation of Khoi-San communities. Other initiatives include land restitution and compensation to indigenous people and initiatives to secure commercial benefit and intellectual property rights for indigenous knowledge, technology and art.

III. Conclusion

245. South Africa, as country, has clearly come a long way – especially as far as the protection and promotion of human rights is concerned. In acceding to the Covenant, South Africa indicated its willingness to maintain a legal and social order that would uphold the values that underlie the Covenant. Importantly, South Africa's accession to the Covenant was an indication of its willingness to be scrutinized by the Committee with regard to measures that it may adopt to fulfil the obligations under the Covenant.

246. Subsequent to the end of apartheid, the Government has tried to implement numerous measures that could ensure that all people in South Africa benefit from the rights under the Covenant. As stated earlier in this report, the adoption of the Constitution was a significant factor in this quest. South Africa's Constitution offers a strong and stable basis on which almost all Covenant rights could be realized in the country. While much progress has been made, challenges remain and the Government remains focused on addressing these challenges. The shadow of apartheid continues to follow the country's development in almost all spheres of life. Despite all the efforts directed at negating the legacy of apartheid, it will clearly be a while before its effects are completely obliterated. The Government thus recognizes that its obligations with respect to the rights under the Covenant are continuing and ever evolving. The Government is, however, adequately poised to meet all challenges in respect of complying with the obligations under the Covenant.